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In the Supreme Court of the United States.

OCTOBER TERM, 1901.

A. W. CORBUS, APPELLANT, *v.* THE ALASKA TREADWELL GOLD MINING Company.	No. 53.
CHARLES STEWART, APPELLANT, *v.* THE WASHINGTON AND ALASKA STEAMship Company et al.	No. 71.
THE PACIFIC STEAM WHALING COMpany, appellant, *v.* THE UNITED STATES.	No. 139.
THE PACIFIC COAST STEAMSHIP COMpany, appellant, *v.* THE UNITED STATES.	Nos. 155, 156, and 157.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA.

ARGUMENT FOR THE UNITED STATES.

I.

LEGISLATION UNDER CONSIDERATION.

These six cases involve the constitutionality of the act of March 3, 1899 (30 Stats., 1336), entitled "An

act to define and punish crimes in the district of Alaska, and to provide a code of criminal procedure for said district."

Section 460 provides as follows:

> That any person or persons, corporation or company prosecuting or attempting to prosecute any of the following lines of business within the district of Alaska shall first apply for and obtain license so to do from a district court or a subdivision thereof in said district, and pay for said license for the respective lines of business and trade as follows, to wit:

Then follows a list of forty-two callings and occupations, among which, applicable to the present case, are the following:

> Fisheries: Salmon canneries, four cents per case; salmon salteries, ten cents per barrel; fish-oil works, ten cents per barrel; fertilizer works, twenty cents per ton.
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> Mines: Quartz mills, three dollars per stamp per year.
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> Mercantile establishments: Doing a business of one hundred thousand dollars per annum, five hundred dollars per annum; doing a business of seventy-five thousand dollars per annum, three hundred and seventy-five dollars per annum; doing a business of fifty thousand dollars per annum, two hundred and fifty dollars per annum; doing a business of twenty-five thousand dollars per annum, one hundred and twenty-five dollars per annum; doing a business of ten thousand dollars per annum, fifty dollars per annum; doing a business of

under ten thousand dollars per annum, twenty-five dollars per annum; doing a business of under four thousand dollars per annum, ten dollars per annum.

Ships and shipping: Ocean and coastwise vessels doing local business for hire plying in Alaskan waters, one dollar per ton per annum on net tonnage, custom-house measurement, of each vessel.

Section 461 makes it a misdemeanor to engage in any of the occupations referred to in said act without first obtaining a license.

Section 462 prohibits the traffic in liquors except as provided in subsequent portions of the act.

Section 463 is as follows:

> That the licenses provided for in this act shall be issued by the clerk of the district court or any subdivision thereof, in compliance with the order of the court or judge thereof duly made and entered; and the clerk of the court shall keep a full record of all applications for license and of all recommendations for and remonstrances against the granting of licenses and of the action of the court thereon. The clerk of the court shall be entitled to receive from each applicant for a license a fee of five dollars, and no other or additional compensation shall be paid such clerk for his services in connection with such license or the issue thereof: *And provided*, That the clerk of said court and each division thereof shall give bond or bonds in such amount as the Secretary of the Treasury may require and in such form as the Attorney-General may approve, and all moneys received

> for licenses by him or them under this act shall be covered into the Treasury of the United States, under such rules and regulations as the Secretary of the Treasury may prescribe.

Sections 464, 465, 466 provide for liquor licenses under certain conditions.

Section 467 provides as follows:

> That no license under this act shall be issued for a greater period than one year, and no license can be transferred by the licensee to any other person except with the written consent of the court by authority whereof the same shall issue, upon application thereto in writing.

Sections 468, 469, 470, 471, 472, 473, 474, 475, 476, 478 contain further provisions with reference to the liquor licenses.

By subsequent legislation (acts of June 6, 1900, 31 Stat. L., 321, and March 3, 1901) 50 per cent of these license fees were directed to be spent for schools and other municipal purposes in Alaska.

II.

NATURE OF PROCEEDINGS.

The cases at bar are six in number, and a brief statement may be made as to the nature of proceedings in each:

(1) In *Corbus* v. *The Alaska Treadwell Gold Mining Company* (No. 53, October term, 1891) Corbus filed, on July 17, 1899, a bill in equity against The Alaska Treadwell Gold Mining Company, which, after averring that the defendant company was a corporation duly incorporated under the laws of the State of Minnesota,

alleged that he, the said Corbus, was the owner of 100 shares of its capital stock; he further alleged that it was the intention of said company, "acting by its said general superintendent in Alaska," to pay the license tax for the year beginning July 1, 1899. Complainant then alleges that said tax is unconstitutional, and therefore should not be paid. Paragraph 8 avers that complainant "has not been able, because of the great distance at which the directors of said company reside, to request them to refuse to pay said tax and to apply for said license, but he has made such requests of the officers or agents of said company controlling its business in Alaska, but they have failed and refused not to make such application and pay such tax, for the reason that, though they doubt the constitutionality of said law, the pains and penalties imposed by said act are so severe that said company and its said officers and agents fear, and have reason to fear, the great loss and injury in defending prosecution that might be brought against it for the failure to comply with it; that they deem it better to submit to the illegal tax than to incur the consequences of the failure to comply with it."

The bill further avers that the payment of said tax would diminish the dividends to be declared on the stock of said company; and "that unless the company should comply with said act or this court grant the relief herein prayed for, the said company would be exposed to a multiplicity of suits and prosecutions for the violation of said act, and would be put to great expense and suffer irreparable injury in defending said suits and avoiding the fines and forfeitures provided by

the said act, and its assets and the value of its shares would be thereby greatly lessened, to the great and irreparable injury and damage to your orator and other shareholders in said company."

The bill therefore prayed for an injunction, which was preliminarily granted.

A subpœna was served on the defendant company on July 19, 1899; no appearance was entered, but on November 15, 1899, the defendants filed a general demurrer, which, on January 2, 1900, was sustained, and the said bills dismissed. This appeal was thereupon taken, and the case was originally heard in this court on April 25, 1901.

No counsel appeared for the defendant in error and no brief was filed by him. The case was restored by the Supreme Court, of its own motion, to the docket, and the Government, while not a party to the record, files this brief as *amicus curiæ*, because of the direct interest which the Federal Government has in the question involved.

In the Corbus case the license tax was imposed upon the operations of certain quartz stamp mills, and the conducting of a mercantile establishment.

(2) In the case of *Stewart* v. *Washington and Alaska Steamship Company, Fredrick Dodwell, and H. C. Wallace, defendants* (No. 71, October term, 1901), the bill averred that the steamship company was a corporation organized under the laws of the State of Washington, and that Dodwell is its treasurer, and Wallace its president; the said company own a steamship called the *City of*

Seattle, whose home port was Tacoma, in the State of Washington, and that said Dodwell and Wallace both live in Tacoma; that said steamship is employed in the transportation of freight and passengers from Tacoma and Seattle to Alaskan ports, and that it "did a coasting trade within the said district of Alaska" before the passage of the act of March 3, 1899, but has not carried on any coasting trade or business since. The bill proceeds to aver that the plaintiff is a stockholder in said company, and that the company, "acting by and through said Wallace, its president, and said Dodwell, its treasurer," intends to, and unless restrained by an order of this court, will pay to the clerk of this court the sum of $767 of the money and funds belonging to the said Washington and Alaska Steamship Company * * * for the purpose of obtaining a license to carry on a coasting trade and business within the District of Alaska, under the said act of Congress approved March 3, 1899.

Complainant proceeds to aver that no license is required for the various reasons therein set forth. The bill fails to aver any demand on the officers of the company not to pay the said license fees, but suggests that unless the defendants be restrained from such payment "your orator would be compelled to commence many suits for the purpose of maintaining his rights, and the moneys and funds of said corporation would be wasted, misappropriated, lost, and destroyed in an amount in excess of $5,000."

The bill was filed on November 7, 1899, and served

upon the agent of the defendant company on November 18, 1899, and on November 7, 1899, a preliminary injunction was granted, and the defendants were "allowed to pay said money into the registry of the court pending the hearing and final determination of the rights of the parties herein." Upon which payment a license was directed to be issued. On November 24, the defendants filed a formal demurrer to the bill, and it appears from the opinion of the court dismissing the bill that "the attorneys for the defendants (referring to this case and the preceding case of *Corbus* v. *Alaska Treadwell Gold Mining Company*) did not contend for his demurrer, made no argument, and filed no brief in support of the same." Copies of the bills having been served upon the district attorney, he asked and obtained leave of the court to appear as amicus curiæ, and in that capacity appeared and denied that the court had any jurisdiction under any of the forms of action presented to hear and determine the cases upon their merits.

For the purpose of procedure the Stewart case is even weaker than the Corbus case, as there is no excuse suggested for failing to make a preliminary demand upon the management of the company not to pay the tax. The pleadings in the case and the suggestions attending it do not seem to differ from that in the Corbus case, as will appear from the opinion of the court.

(3) In the other four cases (Nos. 139, 155, 156, and 157, October term, 1901) petitions were filed by the

appellants in the district court of Alaska on July 6, 1899, which, after averring that each of the applicants is a corporation, incorporated under the laws of the State of California, aver facts which admittedly bring them within the taxing provisions of section 460, above cited.

In *Pacific Steam Whaling Company* v. *United States* (No. 139, October term, 1901), petitioner avers that it is the owner of certain vessels which are employed "in the transporting of freight and passengers between the different ports in the District of Alaska, doing a local business in said District in the prosecution of her voyages to and from different ports in the District of Alaska and carrying freight and passengers for hire." It further avers that it was engaged in the District of Alaska in the business of carrying on salmon canneries at certain places, and while asking for a license to conduct said local steamship business and the said salmon canneries, it denied the constitutionality of the act of Congress providing for said license.

In the three Pacific Coast Steamship Company cases (Nos. 155, 156, and 157), petitioner avers that it is the owner of a certain steamship which is engaged "in the transportation of freight and passengers from the port of Seattle and other ports on Puget Sound and the port of Victoria, British Columbia, to ports in Alaska." It further avers that, "incidentally, it does a local business in the said District of Alaska in the prosecution of her voyages to and from Alaska in the business first mentioned herein." Which business, it

further avers, is "very small and inconsiderable" and "merely incidental to the main business of carrying by said steamer between ports and in the manner hereinbefore stated."

The averments of these three petitions are almost identical, and do not differ in principle.

In all four cases the petitioners, while protesting that the act is unconstitutional, pray, in substance, that the court shall first determine whether the act in question is valid, and if so, that the court shall grant a license thereunder upon the payment of the tax.

As these were mere applications for a license, and were not suits against any litigant, no process was ever served upon the United States or any party defendant. In the argument of the cases, however, it appears that a copy of the petition and protest were served upon the United States attorney, who, by leave of the court, appeared as *amicus curiæ*. The court granted the applications for the licenses in question and directed the license fees, which the applicants had deposited in the registry of the court pending a decision as to their legality, to be paid by the clerk of the court into the United States Treasury, unless an appeal were taken. The applicants thereupon took an appeal and gave the United States attorney notice of it, and in the citation issued the United States is referred to as the appellee.

III.

PROPRIETY OF PROCEDURE.

The lower court held that all six plaintiffs had not raised the questions involved in these proceedings by appropriate procedure. There is much force in the conclusions of the court below in this respect, especially in the two cases (Corbus and Stewart cases), where the action was in the form of a stockholder's bill. This method of determining the rights of the Government in a proceeding between private parties, who in form litigate adversely but who are both benefited by a decree in favor of the plaintiff, is very objectionable, and only to be tolerated when some public exigency, such as existed, when the case of *Pollock* v. *Farmers' Loan and Trust Company* (157 U. S., 229), was argued at the bar of this court.

It is not necessary to elaborate the reasons stated by the learned judge of the court below in disposing of these cases for want of proper procedure. He has shown the clear distinction which exists between the Corbus and Stewart cases and that of *Pollock* v. *Farmers' Loan and Trust Company* (*supra*). So far as the Corbus case is concerned, his finding of fact as to the collusive nature of the suit is emphasized by the subsequent progress of the case, for when the Corbus case was called for argument in the Supreme Court no counsel appeared for the defendant company (appellee) and no brief was submitted by it.

This court, presumably in recognition of the fact that the proceeding was not adverse, restored the case

to the docket for oral argument; and so far as the Corbus and Stewart cases are concerned, the Government again earnestly protests against this method of determining its rights in proceedings to which it was not made a party, and in which both parties litigant are interested and benefited by a decree for the plaintiff. It is obvious that the interests and rights of the Government are affected by the proceedings, and the court should discourage a method of procedure which seeks to deprive the Government of revenue without giving it a day in court. In the case of *Pollock* v. *Farmers' Loan and Trust Company* the Government formally waived its objection to the method of procedure so far as it could waive it. In the Corbus and Stewart cases it refuses to do so, and protests against a method of determining its rights, which, it submits, is opposed to sound public policy. Collusive proceedings are never favored.

The method of procedure in the four other cases (Nos. 139, 155, 156, and 157, October term, 1901) is less objectionable. There were unquestionably practical difficulties which confronted the plaintiffs in these cases in contesting the constitutionality of the legislation in question. The court below was of opinion that these practical difficulties did not justify a method of procedure whereby the plaintiffs in asking for a license at the same time disputed the validity of the law which provided for its issuance. The Government in this connection rests its argument upon Judge Johnson's opinion.

IV.

THE CONTENTION OF THE GOVERNMENT.

Assuming that the court reaches the conclusion that it should take cognizance of these proceedings, I pass to the constitutional questions involved in the case, and I shall contend as follows:

I. The power to impose these license fees is not derived from the general power of taxation provided for in article 1, section 8, of the Constitution, but from the plenary power "to make all needful rules and regulations respecting the territory or other property belonging to the United States" (art. 4, sec. 3). The exercise of such power is, therefore, not subject to the provision limiting the general power of taxation either as to apportionment or uniformity.

In this connection I shall further argue:

(1) The license fees are a part of a penal code, and in the nature of police regulations, and in the judgment of Congress are necessary for the due government of the Territory by reason of its peculiar conditions.

(2) So far as appellants are concerned, the fees are not taxes in the proper sense of the word, but are the consideration which they, as foreign corporations, pay for the privilege of doing business in Alaska.

(3) If taxes at all, these license fees are local taxes imposed by Congress as the legislature of Alaska and paid into the Treasury of the United States as the only treasury of Alaska, and obviously intended to meet the expenses of governing this unorganized territory.

V.

THE CESSION OF ALASKA.

Before discussing the questions above stated in their order, it may be desirable to make a brief historical statement as to the cession and present political status of Alaska, as the constitutional questions must of necessity be discussed with a full consideration of such political status.

Alaska was originally settled by the Russians in 1805. At the time of its cession to the United States by the Emperor of Russia it was in no respect a political entity, but simply a geographical subdivision of the Russian Empire. Its form of government, if it can be said to have any, has been fully considered by this court in the case of *Kinkead* v. *United States*, (150 U. S., 483, 490).

In October, 1867, after the treaty of cession to the United States (act of March 30, 1867, 15 Stat. at Large, 539), a formal transfer was made of this vast region, which aggregated 575,000 square miles. At that time the inhabitants consisted approximately of 500 whites and 30,000 uncivilized aborigines. With the exception of a few inhabitants, who had a title to their individual land holdings, the territory became the physical property of the United States. Its possession was not only the ordinary possession of a sovereign power as the *ultima hæres*, but was a direct and immediate right to the soil as the universal landowner of Alaska. As such it almost wholly remains to-day.

After the transfer to the United States Alaska was governed by a company of United States soldiers and a deputy collector of customs, it having been made a customs district by the act of July 27, 1868.

This system of government continued until June, 1877, when the order came to withdraw the military forces from Alaska. Thereupon the government of the Territory was conducted solely by the Treasury Department, acting through a deputy collector of customs and a few subordinates. So little concern was paid by the Federal Government to this vast region that it was proposed in July, 1878, to abolish the customs district, and when, in 1879, a considerable insurrection broke out among the natives, the white inhabitants appealed to the authorities of British Columbia for protection. The Federal Government sent a war ship, and from 1879 to 1884 Alaska remained under the control of the Navy Department.

During all this time no title could be procured to any land, as the entire domain, with the few exceptions noted, was regarded as the physical property of the Federal Government.

On May 17, 1884, Congress passed an act which is known as the "organic act," although it in no sense organizes the Territory into a self-governing political entity. Reference to that act will show that if it was the intention to create an organized government, such organization was of the most embryonic character according to our standards of government. The form of

government provided for the appointment by the President of a governor, in whom the executive authority was lodged, and for the creation of a district court having civil and criminal jurisdiction. The general laws of the State of Oregon were declared to be the law of said district, and a United States land office was created.

In the judgment of Congress no civil government, in the proper sense of the word, was possible. No suffrage was given the inhabitants. There was and is no electorate or political community, and therefore no local legislature. It was evidently not regarded as a Territory, for section 1882, Revised Statutes, declares that every Territory shall have the right to send a delegate to the House of Representatives of the United States, but Alaska has never been accorded this right, showing the belief of Congress that it was and still remains unorganized territory. This was not merely an oversight, for during the seventeen years during which Alaska was without civil government more than twenty-five bills for the organization of the Territory had been introduced in Congress and failed of passage.

Two things conspired, however, to call the attention, not merely of the United States but of the entire world, to Alaska. One was the discussion as to the seal fisheries, and the other was the discovery of gold in the Klondike region. This led to a large relative increase in the population, which by the census of 1900 is estimated to be as follows: Whites, 30,507;

Indians, 29,536. This increase of population led Congress to provide the acts of March 3, 1899, whereby a criminal code was provided for Alaska, and the act of June 6, 1900, whereby a civil code was provided for Alaska; but the form of the government still remains unchanged. Congress still governs this vast domain through a governor, who is appointed by the President. A judicial system has been organized, and the Treasury Department still continues the territory as a collection district. There is, however, no political entity or body politic known as Alaska; it is a district but not a territory; there is no local legislative body competent to make laws, and no citizenship of Alaska as such to elect representatives. No right of suffrage exists. Its only legislature is Congress, its only governor the representative of the President, its only treasury the Treasury of the United States. The expenses of the government have been defrayed by appropriations from the Federal Treasury, and until the act of March 3, 1899, no attempt was made to exact any local taxes.

In discussing the constitutional questions, therefore, it must be steadily borne in mind that the court is called upon to deal, not with a political entity or organized territorial government, but with a stretch of land largely a wilderness, inhabited by a relatively small population of whites, to whom Congress in its wisdom has not yet seen fit to give the privilege of creating an organized Territorial government.

VI.

(I) The power to impose these license fees is not derived from the general power of taxation provided for in article 1, section 8, of the Constitution, but from the plenary power to make all needful rules and regulations respecting the territory or other property belonging to the United States. (Article 4, section 3.) The exercise of such power is, therefore, not subject to the provision limiting the general power of taxation, either as to apportionment or uniformity.

The powers of Congress with respect to the Territories and the limitations upon such powers were so fully discussed in the Insular Cases that no extended reference is now necessary. It is sufficient to say that if these license fees were not imposed under article 1, section 8, of the Constitution, they are not subject to the limitations contained in that specific provision. If, therefore, these licenses were imposed under article 4, section 3, of the Constitution, and are needful regulations for the due government of the Territory, then the limitations as to apportionment or uniformity are not applicable. The power to make such needful regulations is plenary and exclusive, save as expressly restricted by other *applicable* provisions of the Constitution.

To support my contention that the legislation under consideration is enacted as needful regulations, I suggest—

(1) *The license fees are a part of a penal code, and in the nature of police regulations, and in the judgment of*

Congress are necessary for the due government of the Territory by reason of its peculiar social conditions.

Neither the title nor the body of the act nor the particular provisions under consideration suggest the ordinary taxing statute. The act (31 Stat., 1253) is entitled: "An act to define and punish crimes in the district of Alaska, and to provide a code of criminal procedure for said district."

Its first section constitutes a political subdivision which it calls the "district of Alaska." Then follows an elaborate penal code for the government of its inhabitants, and as an incident to such penal code the paragraph now under consideration was inserted, requiring any person, corporation, or company to obtain a license before prosecuting, or attempting to prosecute, any of the occupations referred to in said paragraph. It is significant, moreover, that the collection of these fees is not left to the collector of customs or of internal revenue, as ordinary excise taxes always are, but are payable to and collected by the clerks of the Alaskan courts.

When regard is had to the peculiar social conditions in Alaska, it is clear that these provisions are intended primarily for the purposes of police regulation, and that the revenue to be derived therefrom is only incidental in nature. The small population of whites had been suddenly increased by the discoveries of gold in the Klondike, and, as in the case of California, an

extraordinary rush of adventurers and fortune hunters from all parts of the world had followed.[a]

It is obvious that with such an invasion of men who, in many instances, were irresponsible adventurers, it was necessary that there should be some governmental supervision of those who should embark in business, and Congress deemed it wise to vest such supervision in the judicial department of the Government by providing, in section 463, that every person, corporation, or company which intended to embark in business, of the kinds mentioned in the act, should apply to the court for a license, and that the granting of this license should be the subject of recommendations or remonstrances by the citizens of Alaska; and that the court, having due regard to such recommendations or remonstrances, should grant or refuse the license in question. This is obviously a police regulation, and differs wholly from the ordinary licenses of the United States internal

[a] Men came from Maine, Texas, Minnesota, and Dakota, and from all the mining regions of the Rocky Mountains. Some had well-matured ideas and plans, and were going with the intention to prospect and mine. Some were of the sporting class and intended to gamble and get through on their wits. The fever was in the air and the blood. It was, as Petrucio says:

> "Such wind as scatters young men through the world,
> To seek their fortunes farther than at home,
> Where small experience grows."

Large outlays were made for gambling, furniture, theatrical outfits, liquors of all kinds, tobacco in every variety. Variety performers, indifferent, bad, and very bad, were in evidence. Prostitutes under various guises and under no guise at all joined the rush. * * * This stampede to Nome is unique. There is nothing in the history of the country like it. The arrivals on the ocean vessels to July 15 were 18,000 souls. One hundred and sixty-two steamships and 70 sailing vessels arrived up to August 1. (Report of Governor of Alaska, 1900.)

revenue, which, as stated in the License Cases (5 Wallace, 462), are not licenses in the proper sense of the term, but simply the method of collecting the annual tax. *In Alaska, however, the supervision of the business through a license is the primary purpose of the act, and revenue is but an incident*, whereas with the ordinary liquor licenses under the internal-revenue system revenue is the primary purpose and the license an incident to it.

In the case of *Wiggins Ferry Company* v. *East St. Louis* (107 U. S., 365), a license fee imposed by the State of Illinois upon a domestic corporation for the privilege of running a ferry between a point in that State and a point in Missouri, was under consideration. As to the nature of such a license fee this court said:

> The power to license is a police power, although it may also be exercised for the purposes of raising revenue. We can not say, as a matter of law, that when a municipal corporation is authorized "to regulate, tax, and license ferry-boats," the imposition of a license fee of $100 per boat is not within the power to regulate and license, and is consequently not within the police power.

Again, page 375, the court say:

> The power of the State of Illinois to authorize any city within her limits to impose a license tax on trades or callings generally, especially those which are quasi public, can not be disputed. Draymen may be compelled to pay a license tax on every dray owned by

> them, hackmen on every hack, tavern keepers on their taverns in proportion to the number of rooms which they keep for the accomodation of guests. We do not think that the Constitution of the United States, by the section which prohibits a State from laying a duty of tonnage, protects the keeper of a ferry from a similar tax upon the boats which he employs. Whether a license fee is exacted under the power to regulate or the power to tax is a matter of indifference if the power to do either exists. The license fee exacted is, in effect, laid upon the business of keeping a ferry; for it is not laid upon all boats owned by the ferry keeper, but only on those plying between the two banks of the river, and is graduated by the number of boats used by him.

It is true that in this case the constitutionality of a State statute was under consideration, but in legislating for Alaska Congress has all the powers both of the Federal Government with respect to the States and of the State governments with respect to their domestic concerns. See also *Ficklen* v. *Shelby County*, 145 U. S., 1, 23, and *Munn* v. *Illinois*, 94 U. S, 113.

The licensing of persons to sell liquor is not an exercise of the taxing power of the State to raise revenue, but of the police power for the regulation and restriction of a dangerous business; it follows that the adjustment of fees for the license is not governed by the constitutional provisions requiring equality and uniformity of taxation. Black on Intoxicating Liquors; *Thomason* v. *State*, 15 Ind., 449. See also Black on Intoxicating Liquors, sec. 108, and cases there cited;

also sections 109 and 179; *Lovingston* v. *Board of Trustees*, 99 Ill., 564.

In *Thomasson* v. *State* (*supra*), a license fee of $50 had been imposed by an act of the legislature of Indiana as the consideration for the privilege of selling liquor. It was held to be void under a provision of the constitution of Indiana, which provides that taxation shall be uniform. The court held otherwise, saying:

> It is claimed that the fee for license, $50, is a tax upon a particular pursuit, and as such is prohibited by section 1 of article 10 of our constitution, providing for a uniform rate of taxation. But it has been decided that that section relates to the general levy alone. (*The Bank* v. *The City of New Albany*, *supra*; *Anderson* v. *The Kerns Draining Company*, 14 Ind., 199.) See, as to unlimited taxing power, Ind. Dig., sec. 16, p. 761. The license upon retailing is an excise. (1 Story on the Const., p. 670.)
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> An excise is an indirect tax; but in this case taxation was not the object of imposing it, and the legislature was not bound to appropriate its proceeds to any object for which the State is forbidden to raise money by local or special taxation. It was imposed in the exercise of the rightful police power of the State, and is an incident of a legitimate police regulation. Hence, it is not within the prohibition of the twenty-second section of the fourth article of the constitution, prohibiting local and special taxation for State purposes. (See 7 How., 283; 2 Story on the Constitution, p. 10, et seq.)

In *Lovingston* v. *Board of Trustees* (99 Ill., 564) a similar license fee for the sale of liquors was held not to be a tax within the constitutional provision of the State of Illinois requiring equality and uniformity. The court say:

> But it is next urged that these license fees are a tax, and they are illegal because they are not uniform. We have been unable to find anything from which it may be inferred that the fees received from dramshop licenses by the city were not uniform in amount and the period for which they were to run. This would seem to be a complete answer to that position.
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> In the cases of *The People* v. *Thurber* (13 Ill., 554) and *East St. Louis* v. *Wehrung* (46 id., 392) it was held that a fee received for a license granted by a municipal corporation, authorizing the sale of liquor, was not a tax, in a constitutional sense, and not being a tax in that sense, it did not violate the constitutional requirement of equality in the levy of taxes.

The power exercised in providing this system of police supervision is, therefore, not the general taxing power under article 1, section 8, but is referable to the distinct power under article 4, section 3, of providing "needful rules and regulations respecting the territory or other property belonging to the United States." It is, therefore, unrestricted as to uniformity.

The Constitution requires uniformity of taxation, but does not require uniformity of police supervision. The power of Congress to adapt its police regulations, or, to use the term of the framers of the Constitution, its "needful

regulations" to the peculiar conditions and needs of each separate territory seems clear. The framers wisely avoided any attempt to create uniformity where uniformity was impossible.

If, therefore, this paragraph 460 can be clearly held to be, in common with the other provisions of this act, a needful regulation of a police character rather than a revenue statute, even though as a mere incident to such police regulation license fees are exacted, then it is constitutional, and, to use the words of Mr. Justice White (*Downes* v. *Bidwell*, 182 U. S., 292), it "is not to be measured by the provision empowering Congress 'to lay and collect taxes, duties, imposts, and excises,' and is not restrained by the requirement of uniformity throughout the United States."

It is true that Mr. Justice White had reference in these words to a levy of "local taxes for local purposes within the territories," but the underlying principle to which I understand him to give utterance is that if a given exercise of legislative power is referable and justified by the power to make needful regulations, even though it incidentally has the characteristics of taxation, it is not subject to a restriction imposed upon the *general* powers of taxation. The two powers are independent, and if the present provision be a "needful regulation" it is justified without respect to the taxing clause of the Constitution.

(2) *So far as appellants are concerned the fees are not taxes in the proper sense of the word, but are the consideration which they, as foreign corporations, pay for the privilege of doing business in Alaska.*

A true license is the consideration of a contract whereby the citizen secures some peculiar right or privilege in return for the fee. A tax, on the contrary, secures nothing except the general benefits of government to which the taxpayer is compelled to contribute, and which he shares in common with every other citizen. He can claim no benefit peculiar to himself by reason of the payment of the tax. The License Cases confirm rather than contradict this theory, for there it was held that internal-revenue licenses were not licenses in the proper sense of the term, and conferred no rights upon the holders with respect to the sale of liquor, but were simply methods whereby a compulsory contribution from liquor dealers was enforced. License fees in the true sense of the term, however, differ in principle, for they partake of the nature of a contract with the State, whereby the licensee obtains some peculiar advantage to himself as the consideration for the payment of the license fee. Such fee is, therefore, not a tax or even an excise in strictness, but the consideration of a contract. The present license fees, as have been stated, are of that nature, for the licensees under the act of 1899 obtain a vested right to pursue a given occupation in Alaska for the space of one year, and the value of such right is enhanced by the fact that no one else can pursue such occupation except such as have paid similar fees and obtained licenses. (See cases cited *ante*, pp. 21 to 24.)

Whatever doubt there may be as to whether such license fees are taxes in the nature of excises with respect to indi-

viduals, there can be none with respect to the six appellees in the cases at bar, for each of them is a foreign corporation, having no legal right to transact business in Alaska, or even recognized existence there, except to the extent that the sovereign power in Alaska permits.

Their incorporation had no extra-territorial efficacy, and the privilege of transacting business in Alaska is a matter of grace on the part of the sovereign power of that territory. Congress, which in Alaska exercises the combined powers both of the States and the Federal Government and which practically represents the people of the United States, has, therefore, the right to determine whether a foreign corporation shall be permitted to do business within the limits of that district, and, if so, upon what conditions. The line of decisions commencing with *Paul* v. *Virginia* (8 Wall., 168), and including *Pensacola Telegraph Company* v. *Western Union Telegraph Company* (96 U. S., 1), hold that as corporations are the mere creation of local law, and have no legal existence beyond the limits of the sovereign which created them, they have no right to do business in any other State except by its permission, and upon the terms it dictates.

The act now under consideration, in the exercise of that undoubted power to exclude foreign corporations, provides, inter alia (sec. 460), "that any person or persons, *corporation* or company transacting, or attempting to transact, any of the following lines of business within the district of Alaska shall first apply for and obtain a license so to do from the district court," etc.

Whatever may be said as to the validity of these license fees in the case of individuals, it is clear that as to foreign corporations Congress, as the legislative body of Alaska, may exact from such corporations as a privilege for their right to do business in that Territory a license fee. On the payment of such license fee the corporations obtained a direct return in the form of a recognition of their existence in Alaska, and the right to do business therein. Such license fees are, therefore, not taxes within the meaning of Article I, section 8, of the Constitution, and therefore are not subject to the restriction as to uniformity, but are simply "needful regulations" for the good order and well-being of the territory.

In considering whether these license fees are "needful regulations and not taxes" the court will, I submit, also bear in mind the familiar principle that every presumption "is in favor of the validity of the act, and it is only when the question is free from any reasonable doubt that the court should hold an act of the law-making power of the nation to be in violation of that fundamental instrument upon which all the powers of the Government rest." (*Nicol* v. *Ames*, 173 U. S., 509.)

The corollary to this rule of law is the principle that the court will favor any reasonable construction of a statute which will sustain its constitutionality, even though the act if differently construed is unconstitutional.

(3) *If taxes at all, these license fees are local taxes imposed by Congress as the legislature of Alaska and paid*

into the Treasury of the United States as the only treasury of Alaska, and obviously intended to meet the expenses of governing this unorganized territory.

Even though these license fees are held to be taxes within the strict sense of that term, yet they are local taxes and are, therefore, not a tax within the meaning of article 1, section 8, for, as Mr. Justice White said in *Downes* v. *Bidwell* (182 U. S., 292):

> *As Congress derives its authority to levy local taxes for local purposes within the Territories, not from the general grant of power to tax as expressed in the Constitution, it follows that its right to locally tax is not to be measured by the provision empowering Congress "To lay and collect taxes, duties, imposts, and excises," and is not restrained by the requirement of uniformity throughout the United States.*

As was said in *Gibbons* v. *District of Columbia* (116 U. S., 404):

> The power of Congress, legislating as a local legislature for the District (Columbia), to levy taxes for District purpose only, in like manner as the legislature of a State may tax the people of a State for State purposes, was expressly admitted, and has never since been doubted. (5 Wheat., 318; *Welch* v. *Cook*, 97 U. S., 541; *Mattingly* v. *District of Columbia*, Id., 687.) In the exercise of this power, Congress, like any State legislature unrestricted by constitutional provisions, may at its discretion wholly exempt certain classes of property from taxation, or may tax them at a lower rate than other property.

If, therefore, a reasonable interpretation of the legislation in question will make the tax in question local in character, that construction will be favored and adopted and the act sustained. To construe these license fees as local taxation (if taxation at all) seems to me reasonable, when it is remembered the conditions for which Congress was legislating.

As has been said, the only legislative body in Alaska is Congress, and similarly the only executive in Alaska is the national executive acting through its local appointees. *Alaska has no distinct treasury and no officer known as treasurer.* As the Congress sitting at Washington is the legislature, so the Treasury Department, located in Washington, is the treasury of Alaska, and Congress presumably knew this when it passed the act of 1899. As will appear from the tables hereto appended, Congress has for many years spent large sums of money in Alaska for the benefit of its inhabitants, for which it has received no adequate return in the form of taxes, and the appropriations for Alaska have always exceeded the revenue derived from its people. Prior to the act of 1899 the people of Alaska, although provided with an inchoate form of government distinct from the National Government, made no return therefor in the shape of taxation. In common with the other inhabitants of the States and Territories, they paid the ordinary internal revenue and tariff duties, for which they shared those privileges of the General Government which are common to all the citizens of the Republic, but for the local government which was established for their immediate benefit they made no

direct return in the shape of local taxation, and this notwithstanding that Congress was expending large sums of money in policing the district, establishing courts, protecting its industries, and otherwise promoting the welfare of its inhabitants. Assuming, therefore, that the license fees in question had any other purpose beyond the "needful regulation" of the occupations in Alaska, it is obvious that they were intended to meet the expenses of administering the act for the local government of Alaska, of which act the license fees are a part. It may be said, however, that Congress did not in words restrict the expenditure of the taxes thus collected to local purposes, but for this there were two reasons. In the first place, there was no separate treasury of Alaska into which the license fees could be paid; and in the second place, Congress may well have assumed from the facts within its possession that as the appropriations for Alaska were in excess of any possible receipts from these license fees, that the moneys thus raised were in fact expended locally within the Territory, for the Government was thus recouping itself for a great drain upon the general funds. If so spent in fact, is it important whether the fund was especially earmarked, especially when the only treasury into which the taxes could be paid and held was the general Treasury of the United States? Such construction is strengthened when it is remembered that by the legislation of the subsequent year one-half of said local fees were expressly appropriated for school purposes within the district.

There being no local treasury in Alaska, Congress could have done no more, except to expressly provide that all of these license fees should be appropriated for and spent in Alaska, but if such an intent may be fairly gathered from the act as a whole, will not the court favor the construction which saves the constitutionality of the legislation in question? This view is further supported by the fact that these license fees are imposed as a part of a penal code and are obviously intended to meet the expenses of its administration. Whatever be the theory, the fact is (as appears from Exhibit A.) that all of the moneys that have been raised by these license fees, or by any other means in Alaska, have been expended by the United States in that district for the benefit of its people.

Had Congress regarded these taxes as general excise taxes it would presumably have left the collection of the inland excises to the internal-revenue department, which collects other internal-revenue duties, and the shipping duties to the collector of customs. On the contrary, the act expressly provides that the clerk of the court shall receive the money and pay the same into the general Treasury. It is therefore obvious that these license fees were not regarded as internal-revenue duties or as a part of the general revenues of the Government. In imposing upon the clerks of the district courts the duty of their collection, their distinctive and local character as a fund apart from the general revenues of the Government is emphasized.

In this connection I again invoke the principles of interpretation heretofore stated on page 28, of this

brief. If the court will favor any reasonable construction that will sustain the constitutionality of the legislation, then I submit it should favor a construction of the act of Congress now under consideration which interprets its true meaning to be that the license fees imposed by said act are levied and collected for the benefit of the people of Alaska, and to be expended therein. If Alaska had a local treasury this construction would be an unreasonable one, and could not be tolerated even to sustain the constitutionality of the legislation; but I submit that where there is no local treasury, the mere fact that local taxes are paid into the general Treasury of the United States (that being the only treasury of Alaska) does not rebut the fair presumption under our constitutional system that local taxes are intended for local purposes only, and that reasonable presumption is strengthened by the fact that Congress presumably knew that the appropriations for the local government in Alaska exceeded and would exceed the amount raised from local and general taxation in this unorganized territory.

VII.

ARTICLE 1, SECTION 9, INAPPLICABLE.

Appellants further argued that these license fees, so far as they apply to the steamship companies, are unconstitutional, as repugnant to section 9, Article I, of the Constitution.

It is clear that such clause has exclusive reference to the States. Even were this not the case, no preference

is given to any Alaskan port as against the ports of the various States, nor is any vessel bound from the port of a State and which enters an Alaskan port compelled by reason of that fact to "enter, clear or pay duties." The act only provides that persons or corporations engaged in the shipping business *within* the district of Alaska shall pay a license fee, which is to be measured by the tonnage of such of its vessels as are "doing local business for hire, plying in Alaskan waters." Such license fee, which applies not to ports, nor to the mere entry of vessels from the ports of other countries or States, can not be regarded as a preference due to any port or as an imposition of duties by reason of the mere entrance of vessels into Alaskan ports.

VIII.

CONSTRUCTION OF ACT OF MARCH 3, 1899.

This leads me to the question of construction suggested by the steamship companies in the brief of their counsel, pages 24 to 38.

It is insisted that as the local business transacted by the appellants was only incidental to the commerce between Alaska and the States where the vessels were registered, and as such business was relatively small, the act did not apply, as the vessels were not "plying in Alaskan waters" within the meaning of said section.

In support of this contention it is first suggested that as these vessels had been enrolled, licensed, and registered under the United States navigation laws in the States of their home ports, no double taxation is to be presumed.

In reply, I submit that this is not a case of double taxation, as the taxes are different in character and purpose. These license fees are in no sense registration taxes for vessels. They are license fees imposed upon the companies which own the vessels as compensation for the privilege of transacting the shipping business within Alaska. They are occupation taxes, although measured by the tonnage of the vessels employed in the business.

As previously stated, these taxes are in no sense clearance or entry duties. A vessel which leaves San Francisco and enters the port of Sitka and there terminates its journey may not be within the taxing provisions of the act, which only apply to those doing a local business. The appellants contend, however, that such local business between Alaskan ports must be exclusive of all other business; but this is to read a provision into the act, and would be pure judicial legislation. It may be, as stated by the appellants, that the local business of these ships is only incidental to their through business, and relatively small, but such fact can not relieve the owners of the vessels from paying the license fee.

It is the local business that is taxed, and it is wholly unimportant for the purposes of taxation whether, in addition to such local business, the licensees do other business.

Appellants have urged that these license fees are excessive and burdensome. Such considerations are for the political department of the Government. It

may be observed, however, that the Treasury statistics, set forth in the official statement of the Assistant Secretary of the Treasury and set forth in Exhibit A and appended to this brief, will show that the Federal Government always has and still is appropriating more money for the benefit of Alaska than it receives from its people from any form of taxation. Hitherto, this district has been a drain upon our revenues, and those who are benefited by its natural resources should not complain if they are made to bear to some extent the burden.

Respectfully submitted.

JAMES M. BECK,
Assistant Attorney-General.

EXHIBIT A.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, November 8, 1901.

Hon. JAMES M. BECK,
Assistant Attorney-General.

SIR: In reply to your request of the 31st ultimo, relative to the appropriations for Alaska and the disposition of the Government's revenues from the Territory, I submit the following statement:

Appropriations.

	1900.	1901.
Salaries of governor, etc	$31,000.00	$70,035.72
Contingent expenses of Territory	2,000.00	2,000.00
Salaries of surveyor-general, etc	3,800.00	10,300.00
Contingent expenses, office of surveyor-general	1,000.00	1,500.00
Traveling expenses of Territory	2,852.00	3,000.00
Rent, office of marshal	10,000.00	14,500.00
Education of children	30,000.00	30,000.00
Education of Indians	5,000.00	.....
Reindeer for Alaska	25,000.00	26,133.53
Supplies for native inhabitants	19,500.00	19,500.00
Refuge station at Point Barrow	106.67	.....
Salaries of agents at seal fisheries	12,950.00	12,950.00
Protection of salmon fisheries	7,000.00	7,000.00
Expenses of inspectors of pelagic seal skins	.....	110.00
Maps of Alaska	18.50	.....
Care and custody of insane	.....	356.21
Repairs and expenses of steamer Thetis	70,000.00	.....
Expenses of revenue vessels in Alaskan waters	132,800.00	188,500.00
Customs service[a]	52,367.79	58,245.89
Internal-revenue service[a]	3,850.00	3,650.00
Light-house service	.....	100,000.00
Expenses of United States courts[a]	55,700.00	339,500.00
Salaries and commissions, land offices[a]	3,000.00	5,200.00
Indian schools	7,000.00	7,000.00
	474,944.96	899,481.35

[a] Estimated.

In the foregoing statement the "estimated" amounts given are the approximate expenditures from general appropriations for the Alaskan service, as far as it is possible to separate them with the data on hand.

The item of "Expenses of United States courts" for 1901 includes receipts by judicial officers which are disbursed directly by them under the provisions of the act of June 6, 1900, section 7 (31 Stat., 324), without being covered into the Treasury, and which do not appear in the following statement of receipts.

Receipts.

	1900.	1901.
From customs	857,623.62	886,593.15
From internal revenue	13,601.96	19,725.02
From sales of public lands	2,376.32	1,889.66
From tax on seal skins	224,476.47	229,755.75
From rent of islands for propagating foxes	1,200.00	2,900.00
From license fees and fines	157,234.94	147,255.33
	456,513.31	488,118.91

For the fiscal year 1900 the license fees were deposited in the Treasury in one sum without subdivision, no separate data thereon being furnished. For the fiscal year 1901 the fees and costs, fines and penalties, and a portion of the license fees were deposited in one sum, amounting to $63,167.43; and the remainder of the license fees, amounting to $84,087.90, were separately covered into the Treasury. Correspondence with the clerk of the United States district court in Alaska established the fact that the information necessary to subdivide the first of the foregoing items for 1901 could not be obtained at that time.

For the fiscal year 1902 the receipts from licenses, fees and costs, fines, penalties, etc., are being covered into the Treasury under instructions of the honorable Attorney-General (see Supplemental Instructions to

Clerks of the District Court of Alaska, May 1, 1901) under separate heads, as follows:

1. "*License fees collected in incorporated towns*," being one-half of the total collections on this account, covered into the Treasury as provided in the act of March 3, 1899, 30 Stat., page 1336, the remaining 50 per cent of these collections being paid over to the treasurer of the corporation for school purposes, under the provisions of the acts of June 6, 1900, 31 Stat., page 521, section 203, and March 3, 1901, 31 Stat., page 1438.

2. "*License fees collected outside of incorporated towns*," being the full amount collected on this account, 50 per cent of which is appropriated and becomes available for school purposes outside of corporate limits, under the direction of the Secretary of the Interior, as provided in the act of March 3, 1901, 31 Stat., page 1438.

3. "*Funds other than license fees available for court expenses*," being the balance of the receipts of this class after the payment therefrom (before deposit is made) of certain court expenses authorized by the judge of the district court, covered into the Treasury under section 7 of the act of June 16, 1900, 31 Stat., page 324.

The receipts under these separate heads for the current fiscal year to date are as follows:

1. License fees collected in incorporated towns	$9,463.30
2. License fees collected outside of incorporated towns	20,822.16
3. Funds other than license fees available for court expenses	3,507.10

Respectfully,

M. E. AILES,
Assistant Secretary.

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In the Supreme Court of the United States.

OCTOBER TERM, 1901.

THE ALASKAN LICENSE CASES.

A. W. CORBUS, APPELLANT, *v.* THE ALASKA TREADWELL GOLD MINING COMPANY.	No. 10.
CHARLES STEWART, APPELLANT, *v.* THE WASHINGTON AND ALASKA STEAMSHIP COMPANY et al.	No. 13.
THE PACIFIC STEAM WHALING COMPANY, appellant, *v.* THE UNITED STATES.	No. 26.
THE PACIFIC COAST STEAMSHIP COMPANY, appellant, *v.* THE UNITED STATES.	Nos. 29, 30, and 31.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA.

POINTS MADE BY THE SOLICITOR-GENERAL.

THE QUESTIONS OF PROCEDURE.

The theory of the other side is that these license taxes collected in Alaska are general taxes; that they are levied for the benefit of the United States, and since they are not uniform throughout the United

States they are unconstitutional. If they are general taxes, I submit that a proper method of procedure has not been used to test their constitutionality.

In two of the cases suits were brought by stockholders to restrain certain corporations from applying for licenses and paying the fees required. In the other so-called cases no suits were instituted and no cases exist.

The two suits brought by stockholders were based upon the decision in the Pollock case. But in that case the trust company held in a fiduciary capacity moneys belonging to many corporations and individuals, and if it had paid the tax against their protest, it might have been subjected to a multiplicity of suits. Moreover, the Government did not press any objections to the method of procedure. So far as it could, the Government waived the point. There were members of the court who did not waive the objection, but vigorously dissented, and I refer the court to what they said.

It is to be observed that in the two cases here, the corporations did not occupy any such fiduciary relation, and the method used is simply an indirect way of bringing a suit to restrain the collection of a tax, which the statute and the policy of the United States prohibit.

An individual applying for a license could not bring a suit of this sort. And yet a corporation engaged in the same business, by this indirect method, avoids the prohibition of the law. The method adopted is clearly one that violates a wise public policy, and I strenuously object to it. If the court should sustain its

propriety in these cases, there is no case in which a corporation can not restrain the collection of a tax.

The second set of so-called cases are, I submit, not cases at all. They are simply applications for licenses accompanied by protests. In the application is incorporated a protest because the law is unconstitutional, and a prayer that the court will determine it to be so. No one was sued, no one was made a party, no one was called upon to defend. It is true the district attorney was notified, and appeared as amicus curiae, but he was not called upon to do so in the discharge of his duty as United States attorney, and might well have remained away.

In applying for a license there was no call made upon the court to act in a judicial capacity. The law might have provided that the license should be issued by the clerk or by any officer of the district in Alaska. The court in determining whether the license should be granted acted in an administrative and not a judicial capacity. Of course, administrative officers in issuing licenses and in levying taxes exercise quasi judicial powers, using discretion and judgment in determining the questions presented to them; but that is not the exercise of a judicial function. It was the duty of the court to keep its administrative separate from its judicial duties. It properly refused to mingle and confuse these separate and distinct functions.

It is to be observed that this method of application and protest, calling upon the court to pass upon the constitutionality of a law, was only another way of

attempting to restrain the collection of the license tax; for, if the court had upon this application determined the law to be unconstitutional, it would have refused to receive the fee and therefore restrained the collection of the tax.

As to the remedy open to these corporations, I suggest they could have made their application and paid the fee under protest, and then have sued the clerk, who was ex officio treasurer of the district, to recover back the sums of money thus paid, at the same time, if they deemed it necessary, applying for an injunction to restrain him from covering the fees into the Treasury of the United States. (See *Ashley* v. *Ryan*, 153 U. S., 436.)

LEGISLATIVE HISTORY.

Alaska was ceded to the United States by the treaty of June 20, 1867. (15 Stat. L., 539; see Appendix.) Before that time it had been occupied and arbitrarily governed by a fur-trading Russian corporation, known as the Russian-American Company. (*Kinkead* v. *United States*, 150 U. S., 483, 490; see Appendix.)

On July 27, 1868 (15 Stat. L., 240; see Appendix), the laws of the United States relating to customs, commerce, and navigation, so far as applicable, were extended to and over Alaska, and the territory was constituted a customs collection district, with a port of entry at or near Sitka. By section 4 the President was authorized to prohibit the importation and use of firearms, ammunition, and distilled spirits in and within Alaska. The power given him was of the broadest character, authorizing the seizure and forfeiture of all

such commodities exported from any part of the United States and destined for Alaska, as well as the seizure and forfeiture of the vessel conveying them. The taking of fur-bearing animals was prohibited and violations of law were to be prosecuted in the United States courts for Oregon, California, or Washington.

By the act of July 1, 1870 (16 Stat. L., 180), provisions were made to prevent the extermination of fur-bearing animals in Alaska. A limitation was placed upon the number of seals which might be killed for their skins upon the islands of St. Paul and St. George. The right to take fur skins there was to be leased and an annual rental paid for the privilege. And it was also provided that in addition to the rental "a revenue tax or duty of $2 is hereby laid on each fur seal skin taken and shipped from said islands during the continuance of such lease, to be paid into the Treasury of the United States." The major part of the revenue collected in Alaska has come from this source, the annual receipts amounting to over $225,000.

Thus the matter remained until the passage of the act of May 17, 1884 (23 Stat. L., 24; see Appendix), which, for the first time provided any system of government for Alaska. The act of 1884 constituted Alaska a civil and judicial district (not a Territory), with a seat of government at Sitka. A governor was provided, charged with the interests of the United States arising in the district, with authority to see that the laws are enforced, to whom was given power to grant reprieves pending the action of the President. A dis-

trict court was established, with civil and criminal jurisdiction of district courts of the United States, and such other jurisdiction as might be established by law. Two terms of court each year were provided and the judge was given authority to make allowances for the necessary expenses of his court. Four commissioners were provided with the civil and criminal jurisdiction of justices of the peace in Oregon, also with testamentary and probate jurisdiction, and with authority to grant writs of habeas corpus returnable before the judge Fines and forfeitures received by them were to be paid over to the clerk of the district court. A marshal was provided with authority to appoint four deputies with not only the duties of deputy United States marshals, but those of constables under the laws of Oregon.

The general laws of Oregon were made the law of the district so far as applicable. Writs of error in criminal cases were to issue to the United States circuit court for Oregon.

The provision of this act to which special attention should be directed is that contained in section 4, which provided:

> That a clerk shall be appointed for said court *who shall be ex officio secretary and treasurer of said district.* * * * The clerk shall record and preserve copies of all the laws, proceedings, and official acts applicable to said district. *He shall also receive all moneys collected from fines, forfeitures, or in any other manner* except from violations of the customs laws, *and shall apply the same to the incidental expenses of the said district*

court and the allowances thereof, as directed by the judge of said court, and shall account for the same in detail, and for any balances on account thereof, quarterly, to and under the direction of the Secretary of the Treasury.

Thus the clerk was made the treasurer of Alaska. All moneys collected there were to be turned over to him, and he was given authority to apply them to the incidental expenses of the court—the court which, it is to be observed, provided, with its officers, practically all the machinery of government in force in Alaska.

While it is true that under the provisions of the act of May 14, 1898 (30 Stat. L., 409), the homestead laws were extended to Alaska and provisions made for the granting of rights of way for railroads, wagon roads, and tramways, as well as for the purchase of land and timber upon certain conditions, the machinery of government provided by the act of 1884 remained in force at the time of the passage of the act of March 3, 1899 (30 Stat. L., 1253—see Appendix), "To define and punish crimes in the district of Alaska and to provide a code of criminal procedure for said district." Alaska had no Territorial form of government, no legislature of its own, no treasury of its own, no revenue of its own, no appropriations of its own. Practically it was governed by the court; its only treasurer was the clerk of the court; its only local revenues the moneys paid to the clerk as treasurer; and substantially its only appropriations the authority on the part of the clerk to pay out of these receipts the incidental expenses of the court.

I particularly call attention to the fact that the local expenses of Alaska, expenses provided for in organized Territories by local taxation, were neither borne by Alaska itself or specially appropriated for by Congress, but were met by the different departments of the Government through the use of general appropriations expended by agents located in Alaska.

In 1897 and 1898 the great rush to Alaska and the Klondike began. Adventurous men from all parts of this country and of the world hurried there. Not simply the hardy and daring, but the reckless and lawless were attracted. The law prohibiting the importation and use of liquor became a dead letter. Many occupations were used for purposes of fraud and extortion. There was a pressing need of regulation and supervision. Legislation was imperatively demanded. As a result, the formulation of not only a criminal but a civil code was begun.

SOURCE OF CONGRESSIONAL POWER.

The criminal code was finished first. As opposing counsel has stated, after that code had been introduced in Congress it was amended by inserting the provisions contained in sections 460 et seq., licensing certain lines of business, for the purpose of regulating these occupations and at the same time of raising revenue to meet the extraordinary increase of local expenses. The criminal code was enacted under the power vested in Congress "to make all needful rules and regulations respecting the territory or other property belonging to the United States." (Art. IV, sec. 3, par. 2.) Under

this Territorial grant Congress has the entire dominion and sovereignty, national and municipal, Federal and State, over the Territories. (*Shively* v. *Bowlby*, 152 U. S., 1.) Congress may do for them "what the people under the Constitution of the United States may do for the States." (*National Bank* v. *Yankton*, 101 U. S., 129.)

Congress therefore had power both to regulate and to tax, and it provided these licenses for both purposes. Both regulation and revenue were needed, and both were provided. It is not necessary, indeed it is impracticable, to dissect the law and distinguish the purposes. Regulation and revenue went together. We can not separate them.

THE LICENSES WERE LOCAL.

The pertinent parts of the act are printed in the Appendix. They obviously provide for local licenses. Such licenses could not be provided except under the power to regulate occupations within the territory affected. Certain occupations are selected for regulation.

Section 460 provides that any person or persons, corporation or company, prosecuting or attempting to prosecute any of the following lines of business within the district of Alaska *shall first apply for and obtain license* so to do from a district court or a subdivision thereof in said district.

Section 463 provides that the license shall be issued by the clerk * * * in compliance with the order of the court * * *; and the clerk shall keep a full record of all applications for license and of all recommendations for and remonstrances against the granting of the licenses and of the action of the court thereon.

Here are clear provisions for an application to the court, the consideration by the court of recommendations for and remonstrances against the granting of the license, and for the action of the court either granting or denying the permit desired. The court is given the power either to permit or refuse authority to carry on the lines of business covered by the act.

THE LICENSE-TAX CASES.

The distinction between a license which grants authority to engage in a particular business, and thus confers a privilege, and a tax which grants no such authority, and therefore confers no privilege, was clearly drawn in the *License-Tax Cases* (5 Wall., 462), wherein the court held that the so-called license tax imposed by the United States upon the liquor business did not provide a license, but merely a tax collected in the form of a license. The court pointed out that the license issued by the General Government conferred no authority to engage in the liquor business in the several States, because Congress had no power to regulate occupations carried on within the States. The court, speaking by Chief Justice Chase, said (p. 470):

> It is not doubted that where Congress possesses constitutional power to regulate trade or intercourse it may regulate by means of licenses as well as in other modes; and, in case of such regulation, a license will give to the licensee authority to do whatever is authorized by its terms.
>
> Thus Congress having power to regulate commerce with foreign nations and among the

several States and with the Indian tribes, may, without doubt, provide for granting coasting licenses, licenses to pilots, licenses to trade with the Indians, and any other license necessary or proper for the exercise of that great and extensive power; and the same observation is applicable to every other power of Congress to the exercise of which the granting of licenses may be incident. All such licenses confer authority, and give rights to the licensee.

But very different considerations apply to the internal commerce or domestic trade of the States. Over this commerce and trade Congress has no power of regulation nor any direct control. This power belongs exclusively to the States. No interference by Congress with the business of citizens transacted within a State is warranted by the Constitution except such as is strictly incidental to the exercise of powers clearly granted to the legislature. The power to authorize a business within a State is plainly repugnant to the exclusive power of the State over the same subject.

The court therefore reached the following conclusion (p. 471):

> But it is not necessary to regard these laws as giving such authority. So far as they relate to trade within State limits they give none, and can give none. * * * The granting of a license, therefore, must be regarded as nothing more than a mere form of imposing a tax, and of implying nothing except that the licensee shall be subject to no penalties under national law if he pays it.

CONGRESS COULD NOT MAKE THESE LICENSES UNIFORM THROUGHOUT THE UNITED STATES.

These are clearly licenses, and therefore clearly local. In granting them the court must consider local conditions, and grant or refuse in view of such conditions. Now, the objection on the other side is that these license taxes are not uniform throughout the United States. But how could Congress make such local regulations uniform throughout the United States? How could Congress provide that all these occupations should also be licensed throughout the United States, in all the States? It would not only be impracticable, but clearly violative of the Constitution. Such occupations can be regulated and licensed within the States only by the States themselves.

THE REVENUE FEATURE.

Passing to the revenue feature, it is asserted that so much money is raised that the measure must be regarded as one for revenue only. In this connection let me refer to what the supreme court of Ohio said in two leading cases on the subject of license taxes. In each of these cases the license tax was assailed on the ground that it violated the uniformity clause of the Constitution, in that it was a tax for general revenue and was not uniform. Respecting the power and policy of licensing certain occupations, Judge Gholson, in the case of *Baker* v. *Cincinnati* (11 Ohio St., 534), said (p. 543):

> We think that the power to prohibit certain things to be done, unless a license be obtained, and to charge for such license, in many instances

of its exercise, stands on the same principle as an assessment An assessment stands on a principle of benefit to property; a charge for a license may be made in view of the special inconvenience and expense to the government, for the benefit of the individual who asks for the license. Things licensed may be such as should only be permitted under the regulation or supervision of public functionaries. The tax or charge may have reference to such regulation and supervision * * * *To say that it is a tax and goes into the public treasury does not disprove this object.*

And in *Marmet* v. *State* (45 Ohio St., 63), Judge Spear said (p. 70):

> *Whether the authority to enact laws of the character of the one in question shall be regarded as based upon the police power of the Government, or upon the taxing power, is, perhaps, not of the greatest importance, provided the power is found to exist. We have the best of authority for the oft-repeated aphorism "there is no magic in names."* The enactment provides for the regulation of relative rights, privileges and duties as between individuals, for the conservation of order and the discouragement of pernicious employments, or of such as may become so, thus keeping its object appparently within the attributes of police power (Cooley on Taxation, 586); but we need not concern ourselves with nice and finely drawn distinctions. Both the police and the taxing power, including power of assessment, are included within the general legislative power vested by our constitution in the general assembly.

In the case of *Wiggins Ferry Co.* v. *East St. Louis* (107 U. S., 365), this court, speaking by Mr. Justice Woods, said (p. 373):

> *The power to license is a police power, although it may also be exercised for the purposes of raising revenue.* We can not say, as a matter of law, that when a municipal corporation is authorized "to regulate, tax, and license ferryboats" the imposition of a license fee of $100 per boat is not within the power to regulate and license, and is consequently not within the police power.

Again (p. 375):

> The power of the State of Illinois to authorize any city within her limits to impose a license tax on trades or callings generally, especially those which are quasi public, can not be disputed. * * * *Whether a license fee is exacted under the power to regulate or the power to tax is a matter of indifference if the power to do either exists.*

IT WAS FOR CONGRESS TO DETERMINE THE AMOUNT OF THE FEE REQUIRED FOR REGULATION.

Opposing counsel contends that more money was required to be paid than was necessary for purposes of regulation. How is the court to determine the question thus raised? In imposing a license tax for regulative purposes, many things must be considered. It may be desirable to put the tax so high as virtually to prohibit the occupation; or to place it at a figure which will localize the business, make it easy of supervision, or restrict it to persons of a certain degree of responsibility; or to put it at a figure which, while not unreasonably limiting the occupation, will confer a privilege for which

a price is charged; or put it at a figure which will repay the Government for the special burdens placed upon the State by reason of the business. These are some of the considerations. How can the court review or revise the action of Congress in fixing a schedule of rates which would result in proper regulation along with sufficient revenue? Each line of business involved in these cases is a proper subject of a license tax.

The liquor business, which is practically everywhere licensed.

The business of salmon canneries, a peculiarly proper subject of regulation in Alaska, in view of the public money spent on the salmon fisheries.

The business of inland water transportation, a quasi public occupation, suitable for supervision.

The mercantile business, which in an unorganized society ought especially to be regulated so as not to be made a means of swindling and extortion.

The tax on quartz mills. What could be more reasonable and just than a tax of $3 per stamp per year on these great stamp mills, which depend for their profit upon the mining interest in Alaska, upon which the Government has expended and is expending immense sums of money?

If the court will examine the list of occupations licensed, it will see that they are such as are usually licensed elsewhere, with the addition of certain ones peculiarly proper for supervision in Alaska. I refer the court especially to the District of Columbia license law.

THE DISPOSITION OF THE LICENSE FEES.

The strong point urged against the license law is that the moneys received are turned into the Treasury. Why this was done, and the effect of it, I shall discuss later. At the threshold I submit, however, for the consideration of the court, where is there any provision in the Constitution prohibiting Congress from covering into the Treasury the proceeds of a local tax which Congress has levied, not under the general power of taxation, but under its power of local Territorial regulation? Congress is given power "to dispose of and make all needful rules and regulations respecting the Territory or other property belonging to the United States." The Territory referred to is regarded as property of the United States. Congress has power either to dispose of it as property or regulate it as it may consider needful. If such regulation results in revenue, why may not Congress cover such revenue into the general Treasury? Congress has power to levy taxes, uniform throughout the United States, and apply the proceeds to the benefit of any territory belonging to the United States.

It is not considered that such use of money collected from the people of all the States is unfair, because the particular territory benefited belongs to all the United States. Why should the reverse of the proposition be regarded as unfair? The people of all the States spend their money for the benefit of a particular territory. What is there in the Constitution to prevent them from regulating trade within that territory so as to reimburse themselves for what they are out of pocket? Since

1870 Congress has recouped itself, as far as it could, by the tax of $2 on each seal skin taken. Was this unconstitutional? If not, why not? No liquor can be sold in Alaska, no railroad run, no local steamship lines operated, no salmon caught or salmon canneries conducted, no mines opened or operated, and, in short, none of the lines of business mentioned in this license law conducted within Alaska except by permission of Congress. Each man who runs such a business enjoys a privilege conferred by Congress, for which he pays a price. What stands in the way of Congress using this price for the general benefit, since the General Government conferred the privilege?

Upon the point that the disposition of the proceeds of a tax does not determine conclusively whether the tax is general or local, let me quote the language of Chief Justice Fuller in his dissenting opinion in *Downes* v. *Bidwell* (182 U. S., 244, 355):

> The fact that the proceeds are devoted by the act to the use of the Territory does not make national taxes local. Nobody disputes the power of Congress to lay and collect duties, geographically uniform, and apply the proceeds by a proper appropriation act to the relief of a particular Territory, but the destination of the proceeds would not change the source of the power to lay and collect. And that suggestion certainly is not strengthened when based on the diversion of duties collected from all parts of the United States to a Territorial treasury before reaching the Treasury of the United States.

> Clause 7 of section 9 of Article I provides that "no money shall be drawn from the Treasury but in consequence of appropriation made by law," and the proposition that this may be rendered inapplicable if the money is not permitted to be paid in so as to be susceptible of being drawn out is somewhat startling.

Further upon this point I call the attention of the court to the language of Judge Spear in the leading case of *Marmet* v. *State* (45 Ohio St., 63, 68), in which it was insisted that covering moneys collected from licenses into the general fund made the tax a general one:

> The last-named section by no means exhausts the taxing power. The provision in section 38 that all moneys received from licenses upon vehicles shall be placed to the credit of the street-repairing fund would seem to refute the claim that the money from this source is raised for general revenue, *although it would not necessarily follow, even if it were required to be placed to the credit of the general fund, that the purpose of the law was exclusively the raising of general revenue, because no impediment exists to placing in one fund moneys intended for different purposes.* So other moneys arising from licenses, though required to be placed to the credit of the general fund, do not by reason of that fact become general revenue.

But, passing this phase of the discussion as a suggestion merely, I come to what was actually done. At the time the license law of 1899 was passed the clerk was the acting treasurer of the district of Alaska, under

the act of 1884. That act empowered him to use all local revenues to pay the incidental expenses of the court. The receipts from licenses were evidently turned over to him, because they were local revenues and he the local treasurer. Evidently, in inserting the provision for the covering of these receipts into the Treasury of the United States, Congress lost sight of the fact that the law of 1884 empowered him to use such collections to pay the incidental expenses of the court, or possibly Congress may have intended him to use this power which he had and only cover into the Treasury the balance remaining. Color to this view is given by the fact that the next year, in 1900, when the civil code was enacted and local machinery of government provided, there was continued in the section defining the powers and duties of the clerk this provision, restated in this form (sec. 7), that—

> He [*the clerk*] *shall also receive all moneys collected from licenses*, fines, forfeitures, or in any other case, except from violations of the customs laws, *and shall apply the same to the incidental expenses* of the proper division *of the district court* and the allowance thereof as directed by the judge, and shall account for the same in detail, and for any balances on account thereof, quarterly, to and under the direction of the Secretary of the Treasury.

In this connection I may say that since 1900 by far the larger portion of the receipts from licenses have been applied to the incidental expenses of the courts. The court expenses in Alaska, on account of the great

distances traveled by witnesses, are enormous, and to meet them a large local fund must be accessible. I happen to know from official reports made to the Department of Justice that in the Hardy case a number of witnesses were paid $600 each for mileage alone.

DIVERSION OF LICENSE FEES TO SCHOOL PURPOSES.

And at this point it may be well to call attention to the fact that in the civil code, enacted in 1900, under the chapter providing for the incorporation of certain towns, it was enacted that 50 per cent of the moneys collected from licenses in such towns should be turned over to the town treasurer for use for school purposes (31 Stat. L., 521—see Appendix). And the next year, 1901, this section was amended so as to provide that if the 50 per cent of the license fees were not needed for school purposes in the municipality the balance might be expended for general municipal purposes (31 Stat. L., 1438—see Appendix). And in this amendment there was included a further provision that 50 per cent of all license fees collected outside of incorporated towns should be turned into the Treasury of the United States and placed at the disposal of the Secretary of the Interior for use for school purposes in Alaska outside of incorporated towns.

POSITION OF THE GOVERNMENT.

But, as I have said, the act of 1899 omitted these provisions for the use in Alaska of the moneys received for licenses, and simply provided that they should be

paid over to the clerk of the court and by him "covered into the Treasury of the United States, under such rules and regulations as the Secretary of the Treasury may prescribe."

Answering the argument of the other side that moneys covered into the Treasury of the United States must be regarded as used for the benefit of the United States generally, I contend—

In the first place, that Congress, having paid all the expenses of Alaska, local as well as general, had a right to reimburse itself by requiring that local revenues collected and held by the local treasurer should be covered into the Treasury of the United States. This is no more than is being done right along in the case of the District of Columbia. Congress, in its appropriation bills for the District, advances the money to pay all the expenses of the District, in anticipation of the collection of the local revenues. When such collections are made they are turned into the Treasury of the United States, at first to the credit of the District fund and afterwards by a general warrant covered into the General Treasury. (31 Stat. L., 766; 32 Stat. L., 616.) In some cases the moneys collected in the District are covered directly into the Treasury to the credit of the general fund. But whatever method is followed, it is simply a case of recouping or reimbursing the Treasury; and this is all that was done in the case of Alaska.

In the second place, I submit that because local revenues are covered into the General Treasury it does not follow that they are necessarily devoted to general purposes. It may be that the only way to use them

for local purposes is to turn them into the General Treasury. Moneys in the General Treasury may be expended either for the benefit of the United States generally or for the benefit of some particular Territory belonging to the United States. If expended for the latter purpose, then they are expended for a local benefit. Now, in the case of Alaska substantially all the expenses of the government of that district were being borne by the General Government through general appropriations. In order to contribute toward bearing these local expenses it was necessary for the local collections to be turned into the General Treasury. The agencies of the General Government operating in Alaska and paid out of general appropriations had to meet the various local requirements. In this way, indirect, but still the only available way at that time, the local collections were used by the General Government for local purposes.

The Constitution itself provides a method of ascertaining from time to time what is being done in the way of collecting and expending public moneys, for it provides (Art. I, sec. 9, par. 7) that no money shall be drawn from the Treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

Subsequently, when the act of 1900 had provided local machinery of government, provision was made for diverting the license fees, in the manner I have already described, and expending them for local purposes without turning them into the Treasury of the United States.

CONCLUSION.

I have had made by the officers of the Treasury (see Appendix) statements of the amount of money collected in Alaska and of the amounts expended for its benefit. These amounts, for the most part, have been picked out of the general appropriations.

It appears from these that the appropriations for the fiscal year ending June 30, 1900, amounted to $474,944.96; for the fiscal year ending June 30, 1901, $899,481.35; for the fiscal year ending June 30, 1902, $966,516.25, and for the fiscal year ending June 30, 1903, $957,335.76.

The collections for 1900 amounted to $456,513.31; for 1901, $488,118.91; for 1902, $431,106.73, and for the first quarter of 1903, $89,196.36.

The collections from the tax on seal skins amounted for the year 1900 to $224,476.47; for 1901, $229,755.75, and for the year 1902, $231,821.20.

I have also had prepared a statement for the fiscal year ending June 30, 1902, which shows by judicial divisions the receipts, disbursements, and deposits of public money by the clerks of the United States court. (See Appendix.)

The receipts from liquor licenses amounted to $168,149.92, while the licenses from all other occupations brought in $117,585.45. Of this there was disbursed for the incidental expenses of the court $112,373.91, and to treasurers of incorporated towns for school purposes $66,963.59; while there was deposited in the Treasury $95,966.94, of which there was

available for school purposes, to be expended by the Secretary of the Interior outside incorporated towns, $31,559.65.

I print in the Appendix a discussion in detail of the questions of procedure raised.

JOHN K. RICHARDS,
Solicitor-General.

DECEMBER 12, 1902.

APPENDIX.

ALASKA BEFORE THE TREATY.

Kinkead v. *United States*, 150 U. S., 483. Mr. Justice Brown said in this case, respecting the government of Alaska (p. 490):

> It appeared that the territory of Alaska had, prior to its cession to the United States, been occupied by a Russian corporation known as the Russian-American Company, a corporation largely engaged in fur trading. This company had the privilege of making use of the public lands and erecting buildings thereon. It had no right, however, of becoming the owner of such lands, but did have the privilege of conveying parcels of it in fee simple to its employees. Pursuant to this privilege, it had made conveyance of certain of these lands to its employees, upon which had been constructed the dwellings erected by the company and occupied by such employees, their widows or children. Apparently, however, it had no right to acquire for itself any title to the soil, and enjoyed nothing more than the use of the land upon which its buildings were situated, the dominion or right of property therein remaining in the Russian Government. The company appears to have possessed not only the ordinary powers of a trading corporation, but certain governmental powers, which it exercised arbitrarily, if not despotically, over the entire territory. It had a monopoly of the trade of the territory, and appears to have been in fact a provincial government of the Russian Empire.

By the first article His Majesty the Emperor of all the Russias agrees to cede to the United States all the territory and dominion now possessed by his said Majesty on the continent of America and in the adjacent islands, the same being contained within certain geographical limits set forth in the article.

By the second article there are included in this cession of territory and dominion the right of property in all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices which are not private individual property.

Property belonging to the Greek Oriental Church was excluded from the cession. Government archives relative to the territory and dominion are to be left in the possession of the United States, but another copy is to be furnished to the Russian Government.

The third article provided:

> The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years; but if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property, and religion. The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.

By the fourth article provisions are made for the formal delivery of the territory; but it is provided that the cession, with the right to immediate possession, is

nevertheless to be deemed complete and absolute on the exchange of ratifications.

Article V provides for the delivery of the fortifications or military posts and for the withdrawal of Russian troops.

By the sixth article the United States agrees to pay, within ten months after the exchange of the ratifications, $7,200,000 in gold.

> The cession of territory and dominion herein made is hereby declared to be free and unencumbered by any reservations, privileges, franchises, grants, or possessions, by any associated companies, whether corporate or incorporate, Russian or any other, or by any parties, except merely private individual property holders; and the cession hereby made conveys all the rights, franchises, and privileges now belonging to Russia in the said territory or dominion, and appurtenances thereto.

ACT OF JULY 27, 1868 (15 STAT. L., 240).

By the act of July 27, 1868 (15 Stat. L., 240), the laws of the United States relating to customs, commerce, and navigation, so far as applicable, were extended to and over Alaska (sec. 1). All of this territory was constituted a customs collection district, with a port of entry to be established at or near Sitka (2). The Secretary of the Treasury was authorized to make regulations for the naturalization of vessels owned by residents of Alaska at the time of its cession (3). The President was given power to regulate or prohibit the importation and use of firearms, ammunition, and distilled spirits, as follows:

> SEC. 4. That the President shall have power to restrict and regulate or to prohibit the importation and use of firearms, ammunition, and distilled spirits into and within the said Territory

> And the exportation of the same from any other port or place in the United States when destined to any port or place in the said Territory, and all such arms, ammunition, and distilled spirits exported, or attempted to be exported, from any port or place in the United States and destined for such Territory, in violation of any regulation that may be prescribed under this section; and all such arms, ammunition, and distilled spirits, landed or attempted to be landed or used at any port or place in said Territory, in violation of said regulations, shall be forfeited; and if the value of the same shall exceed four hundred dollars, the vessel upon which the same shall be found, or from which they shall have been landed, together with her tackle, apparel and furniture, and cargo, shall be forfeited; and any person wilfully violating such regulation shall, on conviction, be fined in any sum not exceeding five hundred dollars or imprisoned not more than six months. And bonds may be required for a faithful observance of such regulations from the master or owners of any vessel departing from any port in the United States having on board firearms, ammunition, or distilled spirits, when such vessel is destined to any place in said Territory, or if not so destined, when there shall be reasonable ground of suspicion that such articles are intended to be landed therein in violation of law; and similar bonds may also be required on the landing of any such articles in the said Territory from the person to whom the same may be consigned.

The coasting trade between Alaska "and any other portion of the United States" was to be regulated according to the laws of the United States (5). The killing of fur-bearing animals was prohibited (6). Violations of law were to be prosecuted in the United States courts in Oregon, California, or Washington (7). The

Secretary of the Treasury may prescribe regulations for carrying into effect this act, except the provisions intrusted to the President alone.

ACT OF MAY 17, 1884 (23 ST., 24).

The act of May 17, 1884 (23 St., 24), constituted Alaska a civil and judicial district, with the seat of government at Sitka (1). A governor was provided, charged with the interests of the United States Government arising within the district, with authority to see that the laws are enforced. Power was given him to grant reprieves pending the decision of the President (2). A district court was established, with civil and criminal jurisdiction of district courts of the United States, and such other jurisdiction as may be established by law. Two terms of the court each year, one at Sitka and the other at Wrangel, were provided. The judge was given authority "to make allowances for necessary expenses of his court" (3).

> SEC. 4. That a clerk shall be appointed for said court, *who shall be ex officio secretary and treasurer of said district*, a district attorney, and a marshal, all of whom shall during their terms of office reside therein. The clerk shall record and preserve copies of all the laws, proceedings, and official acts applicable to said district. *He shall also receive all moneys collected from fines, forfeitures, or in any other manner except from violations of the custom laws, and shall apply the same to the incidental expenses of the said district court* and the allowances thereof, as directed by the judge of said court, and shall account for the same in detail, and for any balances on account thereof, quarterly, to and under the direction of the Secretary of the Treasury.

By section 5 four commissioners were provided, with the civil and criminal jurisdiction of justices of the peace

in Oregon. They were also given jurisdiction in testamentary and probate matters. They were also given power to grant writs of habeas corpus, returnable before the district judge. They had powers of notaries public. Fines and forfeitures collected by them were to be paid over to the clerk. Four marshals were provided for, with authority of United States marshals and powers and duties of constables under the laws of Oregon (6). The general laws of Oregon were made the laws of the district, so far as applicable. Writs of error in criminal cases were to issue to the United States circuit court of Oregon. Final judgments were reviewable by the Supreme Court of the United States (7).

Alaska was created a land district, with certain special provisions (8). The salaries and fees of various officers were established and it was provided that the laws of the United States not locally inapplicable should be extended to the district, but there should be no legislative assembly nor any Delegate (9).

ACT MAY 14, 1898 (30 STAT., 409).

The act of May 14, 1898 (30 Stat., 409), provides for the extension of the homestead laws to Alaska, and for the granting of right of way through the lands of the United States in that district to any railroad company upon certain conditions. Rates and fares in Alaska are to be printed and posted as required by the interstate-commerce act, and are subject to revision and modification by the Secretary of the Interior (sec. 2). The act also contains provisions for the grant of rights of way for wagon roads and tramways (sec. 6). Provisions are made for the purchase of Government land by residents upon certain terms (sec. 10). Also for the sale of timber (sec. 11). The privilege of entering

goods in bond, and of withdrawing them for exportation to Canada, is granted to the government of Canada and its citizens.

ACT OF MARCH 3, 1899 (30 STAT., 1253).

The act of March 3, 1899, to define and punish crimes in the district of Alaska and to provide a code of criminal procedure for said district (30 Stat., 1253):

SEC. 460 (p. 1336). That any person or persons, corporation, or company, *prosecuting or attempting to prosecute any of the following lines of business within the district of Alaska shall first apply for and obtain license* so to do from a district court or a subdivision thereof in said district, and pay for said license for the respective lines of business and trade as follows, to wit:

Abstract offices, fifty dollars per annum.

Banks, two hundred and fifty dollars per annum.

Boarding houses having accommodations for ten or more guests, twenty-five dollars per annum.

Brokers (money, bill, note, and stock), one hundred dollars per annum.

Billiard rooms, twenty-five dollars per table per annum.

Bowling alleys, twenty-five dollars per annum.

Breweries, five hundred dollars per annum.

Bottling works, two hundred dollars per annum.

Cigar manufacturers, twenty-five dollars per annum.

Cigar store or stand, twenty-five dollars per annum.

Drug stores, fifty dollars per annum.

Public docks, wharves, and warehouses, one hundred dollars per annum.

Electric-light plants, furnishing light or power for sale, three hundred dollars per annum.

Fisheries: Salmon canneries, four cents per case; salmon salteries, ten cents per barrel; fish-oil works, ten cents per barrel; fertilizer works, twenty cents per ton.

Freight and passenger transportation lines, propelled by mechanical power on inland waters, one dollar per ton per annum on net tonnage, custom-house measurement, of each vessel.

Gas plants, for heat or light for sale, three hundred dollars per annum.

Hotels, fifty dollars per annum.

Halls, public, ten dollars per annum.

Insurance agents and brokers, twenty-five dollars per annum.

Jewelers, twenty-five dollars per annum.

Mines: Quartz mills, three dollars per stamp per year.

Mercantile establishments: Doing a business of one hundred thousand dollars per annum, five hundred dollars per annum; doing a business of seventy-five thousand dollars per annum, three hundred and seventy-five dollars per annum, doing a business of fifty thousand dollars per annum, two hundred and fifty dollars per annum; doing a business of twenty-five thousand dollars per annum, one hundred and twenty-five dollars per annum; doing a business of ten thousand dollars per annum, fifty dollars per annum; doing a business of under ten thousand dollars per annum, twenty-five pollars per annum; doing a business of under four thousand dollars per annum, ten dollars per annum.

Meat markets, twenty dollars per annum.

Manufactories not enumerated herein, same classification and license charges as mercantile establishments.

Physicians, itinerant, fifty dollars per annum.

Planing mills, fifty dollars per annum when not part of a sawmill.

Pawnbrokers, three hundred dollars per annum.

Peddlers, twenty-five dollars per annum.

Patent medicine venders (not regular druggists), fifty dollars per annum.

Railroads, one hundred dollars per mile per annum on each mile operated.

Restaurants, twenty-five dollars per annum.

Real estate dealers and brokers, fifty dollars per annum.

Ships and shipping: Ocean and coastwise vessels doing local business for hire plying in Alaskan waters, one dollar per ton per annum, on net tonnage, custom-house measurement of each vessel.

Sawmills, ten cents per thousand feet on the lumber sawed.

Steam ferries, one hundred dollars per year.

Toll road or trail, two hundred dollars per annum.

Tobacconists, twenty-five dollars per annum.

Tramways, ten dollars for each mile or fraction thereof per annum.

Transfer companies, fifty dollars per annum.

Taxidermists, twenty dollars per annum.

Theaters, one hundred dollars per annum.

Waterworks furnishing water for sale, fifty dollars per annum.

SEC. 463 (p. 1337). That the licenses provided for in this act shall be issued by the clerk of the district court, or any subdivision thereof, in compliance with the order of the court or judge thereof duly made and entered; and *the clerk of the court shall keep a full record of all applications for license and of all recommendations for and remonstrances against the granting of licenses and of the action of the court thereon.* The clerk of the court shall be entitled to receive from each applicant for a license a fee of five dollars, and no other or additional compensation shall be paid such clerk for his services in connection with such license or the issue thereof: *And pro-*

vided, That the clerk of said court and each division thereof shall give bond or bonds in such amount as the Secretary of the Treasury may require and in such form as the Attorney-General may approve, and *all moneys received for licenses by him or them under this act shall be covered into the Treasury of the United States, under such rules and regulations as the Secretary of the Treasury may prescribe.*

SEC. 468 (p. 1339). That the liquor licenses authorized and provided for by this act shall be of two classes—wholesale liquor licenses and barroom licenses. Every applicant for a liquor license shall deposit the amount of the license fee with the clerk of the court at the time of filing his application for the license. If, upon consideration of the application for license by the court as provided for in this act, the court should determine to grant the license prayed for, it shall notify the clerk and the applicant for such license in writing and the applicant shall thereupon receive his license. The fee for a wholesale license shall be two thousand dollars per annum and for a barroom or retail license in towns or settlements of one thousand five hundred population or upward one thousand five hundred dollars per annum; in towns, camps, or settlements of more than one thousand and less than one thousand five hundred population, one thousand dollars per annum.

* * * * *

SEC. 476 (p. 1340). That all applicants who have had a license during the preceding year shall apply for a renewal of such license on or before November first of each license year, and shall be permitted to continue business until license shall be granted or refused by the court or judge thereof; but in all cases of refusal to grant license such proportion of the license fee as

may have become due shall be deducted and retained from the sum deposited therefor as the time from the first day of November to the date of such refusal bears to the entire license year, and no other person shall be permitted to conduct said business until a license is issued therefor.

SEC. 477. That nothing in this act shall in any way repeal, conflict, or interfere with the public general laws of the United States imposing taxes on the manufacture and sale of intoxicating liquors for the purpose of revenue and known as the "internal-revenue laws."

SEC. 480. That the provisions of this act shall take effect and be in force on and after the first day of July, anno Domini eighteen hundred and ninety-nine.

ACT OF JUNE 6, 1900 (31 STAT., 321).

The act of June 6, 1900, making further provision for a civil government for Alaska, and for other purposes. [31 Stat., 321.]

SEC. 7 (p. 324). * * * He (the clerk) *shall also receive all moneys collected from licenses, fines, forfeitures, or in any other case*, except from violations of the customs laws, *and shall apply the same to the incidental expenses of the proper division of the district court* and the allowance thereof as directed by the judge, and shall account for the same in detail and for any balances on account thereof quarterly to and under the direction of the Secretary of the Treasury. He shall be ex officio recorder of instruments, as hereinafter provided, and also register of wills for the district, and shall establish secure offices where terms of his division of the court are held for the safekeeping of his official records.

SEC. 10 (p. 325). * * * Each clerk shall collect all money arising from the fees of his

office or on any other account authorized by law to be paid to or collected by him, and shall report the same and the disposition thereof in detail, under oath, quarterly, or more frequently if required, to the court, the Attorney-General, and the Secretary of the Treasury, and *all public money received by him* and his deputies for fees or *on any other account shall be paid out by the clerk* on the order of the court, duly made and signed by the judge, and *any balance remaining in his hands after all payments* ordered by the court shall have been made *shall be by him covered into the Treasury of the United States* at such times and under such rules and regulations as the Secretary of the Treasury may prescribe.

SEC. 29 (p. 330). *Provided*, That section four hundred and sixty, chapter forty-four, title two, of "An act to define and punish crimes in the district of Alaska, and to provide a code of criminal procedure for the district," be amended to read as follows:

* * * * *

Boarding houses having accommodations for ten or more guests, twenty-five dollars per annum (amended, fifteen dollars per annum).

* * * * *

Billiard rooms, twenty-five dollars per table per annum (amended, fifteen dollars per table per annum).

Bowling alleys, twenty-five dollars per annum (amended, fifteen dollars per annum).

* * * * *

Cigar store or stand, twenty-five dollars per annum (amended, cigar stores or stands, fifteen dollars per annum).

* * * * *

Public docks, wharves, and warehouses, one hundred dollars per annum (amended, ten cents per ton on freight handled or stored).

* * * * *

Freight and transportation lines, propelled by mechanical power on inland waters, one dollar per ton per annum on net tonnage, custom-house measurement of each vessel (amended, freight and passenger transportation lines, propelled by mechanical power, registered in the district of Alaska, or not paying license or tax elsewhere, and river and lake steamers, as well as transportation lines doing business wholly within the district of Alaska, one dollar per ton per annum on net tonnage, custom-house measurement, of each vessel).

* * * * *

Meat markets, twenty dollars per annum. (Amended, fifteen dollars per annum.)

* * * * *

Restaurants, twenty-five dollars per annum. (Amended, fifteen dollars per annum.)

* * * * *

Ships and shipping: Ocean and coastwise vessels, doing local business for hire, plying in Alaskan waters, one dollar per ton per annum on net tonnage, custom-house measurement of each vessel. (Amended, after "Alaskan waters" insert words "registered in Alaska or not paying license or tax elsewhere.")

* * * * *

Tobacconists, twenty-five dollars per annum. (Amended, fifteen dollars per annum.)

* * * * *

Taxidermists, twenty dollars per annum. (Amended, ten dollars per annum.)

Section 463, chap. 44, title 2, of "An act to define and punish crimes in the district of Alaska and to provide a code of criminal procedure for said district" (30

Stat., 1337), amended by striking out and inserting certain passages, as follows:

> SEC. 463. That the licenses provided for in this act shall be issued by the clerk of the district court or any subdivision thereof in compliance with the order of the court or judge thereof duly made and entered; and the clerk of the court shall keep a full record of all applications for license and of all recommendations for and remonstrances against the granting of licenses and of the action of the court thereon: *[The clerk of the court shall be entitled to receive from each applicant for a license a fee of five dollars, and no other or additional compensation shall be paid such clerk for his services in connection with such license or the issue thereof: And] *provided*, That the clerk of said court and each division thereof shall give bond or bonds in such amount as the Secretary of the Treasury may require and in such form as the Attorney-General may approve, and all moneys received for licenses by him or them under this act shall, **except as otherwise provided by law*, be covered into the Treasury of the United States, under such rules and regulations as the Secretary of the Treasury may prescribe. (See 31 Stat., 332.)

DIVERSION OF LICENSE MONEYS TO SCHOOL PURPOSES.

Chapter 21, incorporation of towns, Civil Code of Alaska (31 Stat., 521), sec. 203, respecting the duties of the treasurer of the corporation, provides—

> That fifty per cent of all license moneys provided for by act of Congress approved March third, eighteen hundred and ninety-nine, entitled "An act to define and punish crimes in the district of Alaska and to provide a code of criminal

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*Matter in brackets stricken out. Matter italicized inserted.

procedure for said district," and any amendments made thereto, required to be paid by any resident, person, or corporation for business carried on within said corporation, shall be paid over by the clerk of the United States district court receiving the same to the treasurer of said corporation, upon taking his receipt therefor in duplicate, one of which duplicate receipts shall be forwarded to the Secretary of the Treasury of the United States by the clerk as a voucher in lieu of cash, and the other receipt shall be retained by the clerk. The money received by the treasurer of the corporation [from the clerk of the court for licenses] shall be used, under the direction of the council, for school purposes: *Provided*, That where it is made to appear to the satisfaction of the district court that the whole amount heretofore or hereafter received by the treasurer of the corporation from the clerk of the court is not required for school purposes, the court may, from time to time, by orders duly made and entered, with a statement of the facts upon which they are based, authorize the expenditure of the accumulated surplus, or any part thereof, for any of the municipal purposes enumerated in this chapter. Fifty per centum of all license moneys provided for by said act of Congress approved March third, eighteen hundred and ninety-nine, and any amendments made thereto, that may hereafter be paid for business carried on outside incorporated towns in the district of Alaska and covered into the Treasury of the United States, shall be set aside to be expended, so far as may be deemed necessary by the Secretary of the Interior, within his discretion and under his direction, for school purposes outside incorporated towns in said district of Alaska.

(The interlineation in brackets and all the proviso added by amendment: See act March 3, 1901, 31 Stat., 1438.)

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, November 29, 1902.

Hon. J. K. RICHARDS,
Solicitor-General, Department of Justice,
Washington, D. C.

SIR: Referring to your communication of the 24th instant, relative to the statement of appropriations for Alaska and of the revenues collected in the Territory for the years 1900 and 1901, furnished to the Department of Justice by Department letter of November 8, 1901,[a] and in reply to your request for an additional statement, bringing the information down to date, I submit the following:

Appropriations.	1902.	1903.
Salaries of governor, etc	$32,625.00	a 1,500.00
Contingent expenses of Territory	2,000.00	2,000.00
Salaries of surveyor-general, etc	8,000.00	8,000.00
Contingent expenses, office of surveyor-general	1,500.00	1,500.00
Traveling expenses of Territory	5,000.00	5,000.00
Rent, etc., office of marshal	10,660.00	10,080.50
Reindeer for Alaska	25,000.00	25,000.00
Supplies for native inhabitants	10,000.00	15,000.00
Salaries of agents at seal fisheries	12,500.00	12,500.00
Protection of salmon fisheries	7,000.00	7,000.00
Expenses, inspectors of pelagic seal skins	100.00	100.00
Care and custody of insane	3,078.76	925.26
Light-House Service	200,000.00	125,075.00
Internal-Revenue Service	2,210.00	2,700.00
Indian schools	7,000.00	7,000.00
Transportation of destitute miners and citizens	920.00	8,500.00
Schools outside of incorporated towns	35,882.41	a 50,000.00
Salaries and commissions, land offices	8,017.65	a 9,000.00
Expenses of revenue vessels in Alaskan waters	120,000.00	a 150,000.00
Customs service	a 56,292.13	a 65,000.00
Expenses of United States courts	a 78,000.00	a 100,000.00
	960,516.25	907,333.76

a Estimated.

[a] See appendix to Mr. Beck's brief.

In the foregoing statement the "estimated" amounts given are the approximate expenditures from general appropriations for the Alaskan service, as far as it is possible to separate them with the data on hand.

The items of "Expenses of United States courts" include receipts by judicial officers which were disbursed directly by them under the provisions of the act of June 6, 1900 (31 Stat., p. 324, sec. 7), without being covered into the Treasury, and do not appear in the receipts as stated below.

The expense of revenue vessels in Alaskan waters is estimated by the revenue-marine division on the basis of a five months' cruise in 1902 and six months in 1903.

Receipts.	1902.	First quarter 1903.
From customs	$62,682.47	$29,510.53
From internal revenues	23,281.17	85.06
From sales of public lands	5,819.90	190.00
From tax on seal skins	261,821.20	(a)
From rent of islands for propagating foxes	.....	190.00
License fees (balance of 1901 receipts)	1,477.49	.....
License fees collected in incorporated towns	22,467.30	26,985.00
License fees collected outside of incorporated towns	71,864.22	24,510.26
Funds other than license fees available for court expenses	8,523.39	7,814.89
Funds not available for court expenses	3,170.53	.....
	331,105.75	89,196.34

a The revenues from this source are usually received and covered into the Treasury during the third quarter of the fiscal year.

The inclosure to your letter is herewith returned.

Respectfully.

M. E. Ailes,
Assistant Secretary.

Statement showing by judicial divisions the receipts, disbursements, and deposits of public moneys by the clerks of the United States court in the district of Alaska for the fiscal year ended June 30, 1902.

RECEIPTS.

1. For licenses in incorporated towns:			
(*a*) Wholesale liquor, barroom, and brewery—			
First division	$54,000.00		
Second division	75,025.01		
Third division	3,500.00		
Total		$112,525.01	
(*b*) Mercantile, hotels, canneries, etc.—			
First division	$15,708.62		
Second division	10,173.21		
Third division	470.00		
Total		26,351.83	
Total for licenses in incorporated towns			$138,876.84
2. For licenses outside incorporated towns:			
(*a*) Wholesale liquor, barroom, and brewery—			
First division	$21,000.00		
Second division	24,624.91		
Third division	10,000.00		
Total		55,624.91	
(*b*) Mercantile, hotels, canneries etc.—			
First division	$63,183.82		
Second division	27,154.84		
Third division	895.00		
Total		91,233.66	
Total for licenses outside incorporated towns			146,858.57
Total for wholesale liquor, barrooms, and breweries		$168,149.92	
Total for mercantile business, hotels, canneries, etc		117,585.49	
Total for licenses			285,735.41

3. For fees, fines, and forfeitures:			
First division		$8,317.25	
Second division		8,880.85	
Third division		2,814.89	
Total			$20,012.99
4. Funds not available for court expenses:			
First division		$492.55	
Second division		8,023.98	
Third division		0.00	
Total			8,516.53
Aggregate receipts			314,264.93

DISBURSEMENTS.

1. From moneys received for licenses in incorporated towns:			
(*a*) Paid to treasurers of incorporated towns—			
First division	$24,855.31		
Second division	40,880.78		
Third division	1,227.50		
Total		$66,963.59	
(*b*) For incidental expenses of court—			
First division	$3,793.31		
Second division	47,202.63		
Third division	0.00		
Total		50,995.94	
2. From moneys received for licenses outside incorporated towns for incidental expenses of court:			
First division	$21,734.84		
Second division	31,850.91		
Third division	6,384.74		
Total		59,970.49	
3. From moneys received for fees, fines, and forfeitures for incidental expenses of court:			
First division	$0.00		
Second division	1,407.48		
Third division	0.00		
Total		1,407.48	
Total court expenses			112,373.91
Total amount disbursed for court and school purposes			179,337.50

DEPOSITS TO CREDIT OF TREASURER, UNITED STATES.

1. From money received for licenses in incorporated towns:		
First division	$18,000.00	
Second division	0.00	
Third division	0.00	
Total		$18,000.00
2. From moneys received for licenses outside of incorporated towns:		
First division	60,942.66	
Second division	0.00	
Third division	2,176.65	
Total		63,119.31
3. From moneys received for fees, fines, and forfeitures:		
First division	10,000.00	
Second division	0.00	
Third division	1,674.10	
Total		11,674.10
4. From receipts not available for court or other Territorial expenses:		
First division	492.55	
Second division	2,680.98	
Third division	0.00	
Total		3,173.53
Aggregate deposits		95,966.94
Available for school purposes outside incorporated towns		31,559.65

RECAPITULATION.

RECEIPTS.

Licenses for manufacture and sale of liquor	$168,149.92
Licenses for other purposes than manufacture and sale of liquor	117,585.45
Total for licenses	285,735.41
For fees, fines, and forfeitures	20,012.99
Total available for incidental expenses of court and school purposes	305,748.40
Not available for incidental expenses of court or school purposes	8,516.53
Aggregate	314,264.93

DISBURSEMENTS.

To treasurers of incorporated towns for school purposes	$66,963.59
For incidental expenses of the court	112,373.91
Aggregate disbursements	179,337.50

DEPOSITED TO THE CREDIT OF THE UNITED STATES.

From moneys received for licenses in incorporated towns	$18,000.00
From moneys received for licenses outside incorporated towns	63,119.31
From fees, fines, and forfeitures	11,674.10
From receipts not available for court or school purposes	3,173.53
Aggregate deposits	95,966.94
Amount available for school purposes outside incorporated towns	31,559.65

MEMORANDUM ON THE QUESTIONS OF PROCEDURE RAISED.

All these proceedings are of an anomalous nature, and present an effort to accomplish indirectly what can not be done directly—the restraint of the collection of a Federal tax.

The several cases naturally fall into two classes. The first two, Nos. 10 and 13, are suits by stockholders to restrain the corporations from applying for and obtaining the licenses required by the provisions of the statute. The other four (Nos. 26, 29, 30, and 31) can not properly be termed "cases" at all. They are merely protests made by the plaintiff companies upon their several applications for licenses under the statute. It may clarify the situation to consider the propriety of these latter proceedings first.

THE PROTESTS.

In No. 26, the *Pacific Steam Whaling Company*, a California corporation, made application, in the form of a petition, to the district court of Alaska for certain licenses. The application stated that the company was the owner of certain steamships engaged "in the transporting of freight and passengers between the different ports in the district of Alaska, doing a local business in said district in the prosecution of her voyages to and from different ports in the district of Alaska, and carrying freight and passengers for hire;" and that it was also engaged in the district of Alaska in the business of carrying on salmon canneries at certain places. In each instance the company denied the applicability of

the Alaskan statute to the business referred to, and also alleged the unconstitutionality of its provisions.

The company asked the court to determine whether it was required to pay into court any license or sum of money under the statute; and if the court should decide that pending the determination of the matters set up it should first obtain the license required by the act, that such license be granted and the money paid therefor be held by the clerk, under protest, subject to the further action of the court.

In Nos. 29, 30, and 31 the *Pacific Coast Steamship Company*, also a California corporation, was the applicant. In each application it was stated that the steamship for which a license was asked, and against the requirement of which protest was made, was engaged "in the transportation of freight and passengers from the port of Seattle and other ports of Puget Sound and the port of Victoria, British Columbia, to ports in Alaska;" but that "incidentally it does a local business in the said district of Alaska in the prosecution of her voyages to and from Alaska in the business first mentioned herein."

The averments and prayers of these three applications were almost identical, and do not differ in principle from each other or from those made in No. 29.

THE PROTESTS NOT A "CASE."

It is apparent from a mere statement of the nature of this group of "protests" that the district court of Alaska had no authority to entertain them for the purpose of passing upon the constitutionality of the provisions of the act in question. Such protests, as the court held, did not constitute a "case" of which a court, in the exercise of its powers as a court, could properly take

cognizance. It is well settled that, within the meaning of the Constitution, a "case" only arises "when some subject touching the Constitution, laws, or treaties of the United States is submitted to the courts by a party who asserts his rights in the form prescribed by law. In other words, a case is a suit in law or equity, instituted according to the regular course of judicial proceedings." (2 Story on Const., sec. 1646; *Osborn* v. *Bank of United States*, 9 Wheat., 738, 819.) It will hardly be argued that these protests, by which the constitutionality of the act of Congress is sought to be determined, are in the form prescribed by law or according to the regular course of judicial proceedings.

The act of May 17, 1884 (23 Stat., 24, sec. 3), establishing a form of civil government for Alaska, provides that the district court for that district thereby created shall exercise the civil and criminal jurisdiction of district courts of the United States, "and such other jurisdiction, not inconsistent with this act, as may be established by law." But whatever jurisdiction it may possess or receive, it must exercise the same according to the fundamental rules of judicial procedure. It has been given no authority to disregard them.

Under the act of 1899, the district court of Alaska was empowered and required to issue the licenses provided therein, but that fact could not authorize it, upon a mere application for a license coupled with a protest against it, to pass upon the validity of the statute imposing the license. Its authority upon such application was limited to determining whether or not the license should issue.

In the exercise of its power to grant licenses, the district court was performing an administrative and not a judicial function. The authority to issue licenses

is usually conferred upon an executive officer of the Government. It was conferred upon the district court in this instance, because that court, with its officers, the clerk, the marshal, and his deputies, formed practically the whole machinery of government in Alaska.

If, however, the authority to issue these licenses had been reposed entirely with the clerk of the court, or with some official wholly outside of the court, it would never have been contended that either would have had authority upon an application for a license, although possessing all the power of the court in that respect, to determine the validity of the statute requiring the license. Nor would it have been asserted that the applicant for a license, by filing a protest against its requirement in the district court (that court having nothing to do with the granting of the same), could have authorized or compelled the court to pass upon that question.

The only doubt in the present instance arises from a failure to distinguish between the different functions of the district court. The court could grant licenses. It might also, in the exercise of its strictly judicial powers, pass upon the validity of legislation. It is therefore speciously argued that upon an application for the exercise of the former power the latter also was invoked. But viewed as they should be, according to their separate and distinct nature, no confusion can exist. The judicial power of the court could only be invoked in the form prescribed by law. An application to it for a license was not a proper method.

THE SUITS.

The first two cases, Nos. 10 and 13, are suits in equity. In form, therefore, they are sufficient, but the question is as to their propriety.

No. 10, *Corbus* v. *The Alaska Treadwell Gold Mining Company*, was a suit by a stockholder of that company, a corporation of Minnesota doing business in Alaska, to have it restrained from paying the license taxes upon its business imposed by the act of 1899, namely, a tax of $3 upon each of the 450 stamps for crushing and reducing ore used by the company in its mining business, and a tax of $250 upon the mercantile establishment also conducted by it in Alaska.

The plaintiff alleged that he had not been able, because of the great distance at which the directors of the company resided, to request them to refuse to apply for a license and pay said tax, but that he had made such requests of the officers or agents of the company in Alaska, who had refused the same, for the reason that, while doubting the constitutionality of the law, they deemed it better to submit to the tax than to incur the consequences of a failure to comply with it.

The bill further alleged that the payment of the tax would diminish the dividends to be declared on the stock of the company, and that, unless the company complied with the act or the court grant the relief prayed for, "the said company would be exposed to a multiplicity of suits and prosecutions for the violation of the said act, and would be put to great expense and suffer irreparable injury in defending said suits and avoiding the fines and forfeitures provided by the said act, and its assets and the value of its shares would be thereby greatly lessened, to the great and irreparable injury and damage to your orator and other shareholders in said company."

No. 13, *Stewart* v. *The Washington and Alaska Steamship Company et al.*, was also a suit by a stockholder to restrain that company, a corporation of Washington,

and its officers from applying for a license for one of its vessels, for the purpose of enabling it to carry on a coasting trade and business within the district of Alaska under the act of 1899; the license in this case amounting to $767.

The plaintiff averred that no license was required, and also that the act was unconstitutional.

No demand on the officers of the company not to pay the license fee was alleged; but it was averred that unless the defendants were restrained from such payment plaintiff "would be compelled to commence many suits for the purpose of maintaining his rights, and the moneys and funds of said corporation would be wasted, misappropriated, lost, and destroyed in an amount in excess of $5,000."

NO SUIT LIES TO RESTRAIN THE COLLECTION OF A TAX.

Section 3224 of the Revised Statutes provides:

> SEC. 3224. No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

The taxpayer has not, however, been left without a remedy. Section 3226, Revised Statutes, provides:

> SEC. 3226. No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until appeal shall have been duly made to the Commissioner of the Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the Commissioner has been had therein: *Provided*, That

> if such decision is delayed more than six months from the date of such appeal, then the said suit may be brought, without first having a decision of the Commissioner at any time within the period limited in the next section.

Commenting upon these provisions, Mr. Justice Miller, in the *State Railroad Tax Cases* (92 U. S., 575), said (p. 613):

> It has been repeatedly decided that neither the mere illegality of the tax complained of nor its injustice nor irregularity of themselves give the right to an injunction in a court of equity. (*Moores* v. *Smedley*, 6 Johns. Ch., 27; *Dodd* v. *Hartford*, 26 Conn., 239; *Green* v. *Munford*, 5 R. I., 478; *Messert* v. *Supervisors of Columbia*, 50 Barb., 190; *Dow* v. *Chicago*, 11 Wall., 108; *Hannewinkle* v. *Georgetown*, 15 Wall., 548.)
>
> The Government of the United States has provided both in the customs and in the internal revenue a complete system of corrective justice in regard to all taxes imposed by the General Government, which in both branches is founded upon the idea of appeals within the Executive Departments. If the party aggrieved does not obtain satisfaction in this mode, there are provisions for recovering the tax after it has been paid by suit against the collecting officer. But there is no place in this system for an application to a court of justice until after the money is paid.
>
> That there might be no misunderstanding of the universality of this principle, it was expressly enacted in 1867 that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." (Rev. Stat., sec. 3224.) And though this was intended to apply alone to taxes levied by the United States, it shows the sense of Congress of the evils to be

> feared if courts of justice could, *in any case*, interfere with the process of collecting taxes on which the Government depends for its continued existence. It is a wise policy. It is founded in the simple philosophy derived from the experiences of ages that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment. And to do this successfully other instrumentalities and other modes of procedure are necessary than those which belong to courts of justice. (See *Cheatham* v. *Norvell*, decided at this term; *Nickoll* v. *United States*, 7 Wall., 122; *Dow* v. *Chicago*, 11 Wall., 108.)

The rule thus announced—the absoluteness of the prohibition against suits to restrain the collection of taxes levied by the United States, and the exclusiveness of the remedy provided by the statute—has since been sustained by the decisions of this court, which have been followed by the other courts of the United States. (*Snyder* v. *Marks*, 109 U. S., 189; *Shelton* v. *Platt*, 139 U. S., 591, 597; *Pittsburgh, etc., Railway* v. *Board of Public Works*, 172 U. S., 32, 39.)

In *Snyder* v. *Marks*, the court held that a bill in equity would not lie to enjoin a collector of internal revenue from collecting a tax, although it was alleged to have been illegally assessed; that the prohibition in section 3224 of the Revised Statutes applied to suits to restrain illegal as well as legal taxes. In delivering the opinion Mr. Justice Blatchford said (p. 193):

> The inhibition of section 3224 applies to all assessments of taxes, made under color of their offices, by internal-revenue officers charged with general jurisdiction of the subject of assessing taxes against tobacco manufacturers. The remedy of a suit to recover back the tax after it is paid is provided by statute, and a suit to restrain its collection is forbidden. The remedy so given

> is exclusive, and no other remedy can be substituted for it. Such has been the current of decisions in the circuit courts of the United States, and we are satisfied it is a correct view of the law. (*Howland* v. *Soule*, Deady, 413; *Pullan* v. *Kinsinger*, 2 Abbott, U. S., 94; *Robbins* v. *Freeland*, 14 Int. Rev. Rec., 28; *Delaware R. R. Co.* v. *Prettyman*, 17 id., 99; *United States* v. *Black*, 11 Blatchford, 538, 543; *Kissinger* v. *Bean*, 7 Bissell, 60; *United States* v. *Pacific Railroad*, 4 Dillon, 66, 69; *Allan* v. *Bean*, 23 Int. Rev. Rec., 351; *Kensell* v. *Stivers*, 18 Blatchford, 397.) In *Cheatham* v. *United States*, 92 U. S., 85, 88, and again in *State Railroad Tax Cases*, 92 U. S., 575, 613, it was said by this court that the system prescribed by the United States in regard to both customs duties and internal-revenue taxes of stringent measures, not judicial, to collect them, with appeals to specified tribunals and suits to recover back moneys illegally exacted was a system of corrective justice intended to be complete, and enacted under the right belonging to the Government to prescribe the conditions on which it would subject itself to the judgment of the courts in the collection of its revenues. In the exercise of that right it declares by section 3224 that its officers shall not be enjoined from collecting a tax claimed to have been unjustly assessed, when those officers, in the course of general jurisdiction over the subject-matter in question, have made the assignment and claim that it is valid.

The case of *Pollock* v. *Farmers' Loan and Trust Company* (157 U. S., 429) is an apparent exception to the general rule. In that case the court, speaking by the present Chief Justice, said (p. 554):

> The objection of adequate remedy at law was not raised below, nor is it now raised by appel-

lees, if it could be entertained at all at this stage of the proceedings; and, so far as it was within the power of the Government to do so, the question of jurisdiction, for the purposes of the case, was explicitly waived on the argument. The relief sought was in respect of voluntary action by the defendant company, and not in respect of the assessment and collection themselves. Under these circumstances, we should not be justified in declining to proceed to judgment upon the merits. (*Pelton* v. *National Bank*, 101 U. S., 143, 148; *Cummings* v. *National Bank*, 101 U. S., 153, 157; *Reynes* v. *Dumont*, 130 U. S., 354.)

Mr. Justice White, in whose dissenting opinion Mr. Justice Harlan concurred, was of opinion that the circuit court had no jurisdiction of the case. He said (p. 609):

> The decisions of this court hold that the collection of a tax levied by the Government of the United States will not be restrained by its courts. (*Cheatham* v. *United States*, 92 U. S., 85; *Snyder* v. *Marks*, 109 U. S., 189. See also *Elliott* v. *Swartwout*, 10 Pet., 137; *City of Philadelphia* v. *The Collector*, 5 Wall., 720; *Hornthall* v. *The Collector*, 9 Wall., 560.)
>
> The same authorities have established the rule that the proper course in a case of illegal taxation is to pay the tax under protest, or with notice of suit, and then bring an action against the officer who collected it. The statute law of the United States in express terms gives a party who has paid a tax under protest the right to sue for its recovery. (Rev. Stat., sec. 3226.)
>
> The act of 1867 forbids the maintenance of any suit "for the purpose of restraining the assessment or collection of any tax." The provisions of this act are now found in Revised Statutes, section 3224.

> The complainant is seeking to do the very thing which, according to the statute and the decisions above referred to, may not be done. If the corporator can not have the collection of the tax enjoined it seems obvious that he can not have the corporation enjoined from paying it, and thus do by indirection what he can not do directly.

Replying to the argument that the relief sought was in respect of voluntary action by the defendant company, and not in respect of the assessment and collection themselves, he said (p. 612):

> The assertion that this is only a suit to prevent the voluntary payment of the tax suggests that the court may, by an order operating directly upon the defendant corporation, accomplish a result which the statute manifestly intended should not be accomplished by suit in any court. A final judgment forbidding the corporation from paying the tax will have the effect to prevent its collection, for it could not be that the court would permit a tax to be collected from a corporation which it had enjoined from paying. I take it to be beyond dispute that the collection of the tax in question can not be restrained by any proceeding or suit, whatever its form, directly against the officer charged with the duty of collecting such tax. Can the statute be evaded in a suit between corporation and a stockholder by a judgment forbidding the former from paying the tax, the collection of which can not be restrained by suit in any court? Suppose, notwithstanding the final judgment just rendered, the collector proceeds to collect from the defendant corporation the taxes which the court declares in this suit can not be legally assessed upon it. If that final judgment is sufficient in law to justify re-

> sistance against such collection, then we have a case in which a suit has been maintained to restrain the *collection* of taxes. If such judgment does not conclude the collector, who was not a party to the suit in which it was rendered, then it is of no value to the plaintiff. In other words, no form of expression can conceal the fact that the real object of this suit is to prevent the collection of taxes imposed by Congress, notwithstanding the express statutory requirement that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." Either the decision of the constitutional question is necessary or it is not. If it is necessary, then the court, by way of granting equitable relief, does the very thing which the act of Congress forbids. If it is unnecessary, then the court decides the act of Congress here asserted unconstitutional without being obliged to do so by the requirements of the case before it.

But even if the exception made by the Pollock case be sustained, it is apparent from an examination of their circumstances that these cases do not come within its principles. Preceding the quotation above made from the opinion of the court in the Pollock case is this statement (p. 553):

> The jurisdiction of a court of equity to prevent any threatened breach of trust in the misapplication or diversion of the funds of a corporation by illegal payments out of its capital or profits has been frequently sustained. (*Dodge* v. *Woolsey*, 18 How., 331; *Hawes* v. *Oakland*, 104 U. S., 450.)
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> As in *Dodge* v. *Woolsey*, this bill proceeds on the ground that the defendants would be guilty of such breach of trust or duty in voluntarily making returns for the imposition of, and

paying, an unconstitutional tax: and also on allegations of threatened multiplicity of suits and irreparable injury.

There is no such relation between the defendant corporations and their stockholders in these two cases as existed in the Pollock case. In that case the Farmers' Loan & Trust Company was charged with the execution of numerous trusts, and it might well be said that its compliance with the provisions of the income tax law would have exposed it to numerous suits by those toward whom it occupied fiduciary relations.

WHEN A STOCKHOLDER MAY SUE.

Upon this subject, Taylor, in his treatise on Corporations, says:

> SEC. 138. When in order to enforce corporate rights or avert wrongs threatening the corporate interests it is necessary to sue, the rule is that the suit must be brought by the corporate management in the name of the corporation. This rule applies to suits both at law and in equity. Individual shareholders are not the proper parties to sue or defend on behalf of corporate interests. If, however, the corporate management refuses or fails to enforce corporate rights and an irreparable injury to the corporate interests is threatened, a shareholder, in a case where the corporation itself would be entitled to an injunction, may bring suit on behalf of himself, and others interested who may join, to enjoin the threatened injury. In such case the shareholder should set forth in his complaint or bill the efforts that he has made to induce the corporation to act in the matter, should allege its refusal or failure to sue, and should make it a party defendant in the action.
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> SEC. 555. To warrant the interference of a court, at the instance of a shareholder, to restrain

> an act intended by the body corporate or the corporate management, the act should be beyond the corporate powers; or, if intended by the corporate management, a manifestly improper act which the body corporate is not in a position to prevent, owing perhaps to the fact that the management can not be changed in time.

In *Dodge* v. *Woolsey* (18 How., 331), referred to by the court in the Pollock case, it was held that a shareholder in a bank could maintain a bill to enjoin the collection of an unlawful State tax on the bank, the directors having declined to sue under circumstances that rendered their refusal a breach of trust.

Commenting on this decision, the court, in *Memphis City* v. *Dean* (8 Wall., 64), speaking by Mr. Justice Nelson, said (p. 73):

> The judgment of the court in *Dodge* v. *Woolsey* authorizes a stockholder of a company to institute a suit in equity in his own name against a wrongdoer whose acts operate to the prejudice of the interests of stockholders, such as diminishing their dividends and lessening the value of their stock, in a case where application has first been made to the directors of the company to institute a suit in its own name, and they have refused. This refusal of the board of directors is essential in order to give to the stockholder any standing in court, as the charter confers upon the directors representing the body of stockholders the general management of the business of the company. There must be a clear default therefore on their part, involving a breach of duty, within the rule established in equity, to authorize a stockholder to institute the suit in his own behalf or for himself and other stockholders who may choose to join.

It is plain that the suits by Corbus and Stewart against their respective corporations do not come within

the principles thus announced as entitling a shareholder to sue. In applying for a license under the Alaskan act, the defendant corporations could not be said to be doing an act *ultra vires*. Nor would such application be a misuse of the corporate funds and constitute a breach of trust. If, after obtaining a license, they had refused to sue to recover it back, the principles announced in *Dodge* v. *Woolsey* might apply, and a suit by a shareholder would have been authorized. But such is not the case here.

In the Stewart case it appears that the complainant resorted to his suit without even making a demand upon the management of the company not to pay the tax. In other words, supposing a suit to enjoin the company from paying the tax could have been maintained, if the company intended to act contrary to the wishes of a stockholder, or a majority of the stockholders, he failed to observe the very first requirement for the maintenance of such a suit.

WHEN A COURT OF EQUITY WILL INTERFERE TO RESTRAIN THE COLLECTION OF A TAX.

In the *State Railroad Tax Cases*, above cited, it was observed by Mr. Justice Miller that while section 3224, Revised Statutes, "was intended to apply alone to taxes levied by the United States" (which limitation would seem to include the taxes here in question, as they are certainly taxes levied by the United States), "it shows the sense of Congress of the evils to be feared if courts of justice could, *in any case*, interfere with the process of collecting taxes on which the Government depends for its continued existence." Referring to *Dow* v. *Chicago* (11 Wall., 108), he said (92 U. S., p. 614):

> In this latter case, this court, after commenting upon the necessary reliance of the State

governments upon the prompt collection of the taxes for their support and maintenance, and the ill consequences of interference with their proceedings in that matter, says: "No court of equity will therefore allow its injunction to issue to restrain their action, except where it may be necessary to protect the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, when the property is real estate, throw a cloud upon the title of complainant before the aid of the court of equity can be invoked."

So, in the case of *Hannewinkle* v. *Georgetown*, the court says: "It has been the settled law of this country for a great many years that an injunction bill to restrain the collection of a tax on the sole ground of the illegality of the tax can not be maintained. There must be an allegation of fraud, that it creates a cloud upon the title, that there is apprehension of a multiplicity of suits, or some cause presenting a case of equity jurisdiction." (15 Wall., 548.) We do not propose to lay down in these cases any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes; but we may say that in addition to illegality, hardship, or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction, and that mere errors or excess in valuation, or hardship or injustice of the law, or any grievance which can be remedied by a suit at law, either before or after payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax.

So, in the late case of *Pittsburgh, etc., Railway* v. *Board of Public Works* (172 U. S., 32), Mr. Justice Gray, speaking for the court, said (p. 37):

> The collection of taxes assessed under the authority of a State is not to be restrained by writ of injunction from a court of the United States, unless it clearly appears not only that the tax is illegal but that the owner of the property taxed has no adequate remedy by the ordinary processes of the law, and that there are special circumstances bringing the case under some recognized head of equity jurisdiction. (*Dows* v. *Chicago*, 11 Wall., 108; *Hannewinkle* v. *Georgetown*, 15 Wall., 547; *State Railroad Tax cases*, 92 U. S., 575; *Union Pacific Railway* v. *Cheyenne*, 113 U. S., 516; *Milwaukee* v. *Keffler*, 116 U. S., 219; *Shelton* v. *Platt*, 139 U. S., 591.)

In the case of *Corbus* v. *The Alaska Treadwell Company* the only equitable considerations alleged are that "unless the company should comply with said act or this court grant the relief herein prayed for the said company would be exposed to a multiplicity of suits and prosecutions for the violation of said act, and would be put to great expense and suffer irreparable injury in defending said suits and avoiding the fines and forfeitures provided by the act," etc. But the plaintiff entirely ignores the fact that his company could easily escape the multiplicity of suits and prosecutions and its attending expense and injury by simply paying the tax under protest and suing to recover it back.

In *Stewart* v. *The Washington and Alaska Steamship Company* the equitable ground urged by the plaintiff is that, unless the company and its officers are restrained from paying the tax, "your orator would be compelled to commence many suits for the purpose of maintaining his rights, and the moneys and funds of

said corporation would be wasted, misappropriated, lost, and destroyed in an amount in excess of $5,000."

The weakness of this assertion is apparent. Why the plaintiff would be required to commence many suits for the purpose of maintaining his rights is far from clear. How he could bring so many suits for that purpose is also somewhat mixed. And it might be added that if he had the interests of his corporation at heart he would refrain from causing its moneys and funds to be wasted, misappropriated, lost, and destroyed to such a large amount by bringing so many needless actions. It would seem that he could have his rights determined in a single suit, if at all.

ADEQUATE REMEDY AT LAW.

If, as appellants contend, the license taxes imposed by section 460 of the Alaskan act are general taxes, the provision of section 3226, Revised Statutes, for the recovery of such taxes must unquestionably apply.

The section applies to "any internal tax" alleged to be erroneously or illegally assessed or collected. The taxes in question, though provided for Alaska only, must certainly be considered "internal" taxes, in view of the fact that they are levied by the United States and the proceeds therefrom go into the general Treasury. They undoubtedly raise internal revenue.

But even if section 3226 does not apply, the defendant corporations would not be without remedy. In *Erskine* v. *Van Arsdale* (15 Wall., 75), which was a suit against a collector of internal revenue to recover back certain taxes imposed by an act of Congress, Mr. Chief Justice Chase, in delivering the opinion of the court, said (p. 77):

> We think, as respects the second exception, that there is no error in the charge prejudicial

to the defendants. Taxes illegally assessed and paid may always be recovered back, if the collector understands from the payer that the taxes are regarded as illegal and that suit will be instituted to compel the refunding of them.

The case of *Ashley* v. *Ryan* (153 U. S., 436) is instructive as showing the course that may be pursued for the recovery of taxes illegally assessed. In that case the corporation law of Ohio provided that the secretary of state should charge and collect, for filing the articles of incorporation of any corporation whose capital stock was over $10,000, a fee of one-tenth of 1 per cent upon its authorized capital stock. A consolidated railroad corporation, composed of an Ohio corporation and several corporations organized under the laws of other States, presented its articles of incorporation to the secretary of state, but tendered only an amount representing the fee upon the capital stock of the Ohio corporation. The secretary refused to file the proffered articles for that amount, and demanded the fee upon the entire amount of the capital stock of the consolidated corporation. This amount was paid under protest, and suit was at once brought to recover all the excess paid over and above the amount originally tendered, upon the ground that such excess had been collected without warrant of law. Pending the controversy an injunction was issued restraining the secretary of state from covering into the State treasury the sum which had been paid him under protest.

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